

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW PICHE
WILL BE ISSUED.

. 84-1667-CFX
atus: GRANTED

Title: Bethel School District No. 403, et al., Petitioners
V.
Matthew N. Fraser, a Minor and E. L. Fraser,
Guardian Ad Litem

cketed:
ril 19, 1985

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Coats, William A.

Counsel for respondent: Haley, Jeffrey T.

try	Date	Note	Proceedings and Orders
1	Apr 19 1985	G	Petition for writ of certiorari filed.
2	Apr 25 1985		Waiver of right of respondent Matthew Fraser to respond filed.
3	May 1 1985		DISTRIBUTED. May 16, 1985
4	May 15 1985	P	Response requested. (Due June 14, 1985 - NONE RECEIVED)
6	Jun 18 1985		Order extending time to file response to petition until July 9, 1985.
9	Jul 12 1985		Brief of respondent Matthew N. Fraser, etc. in opposition filed.
0	Jul 17 1985		REDISTRIBUTED. September 30, 1985
1	Oct 7 1985		Petition GRANTED. *****
2	Nov 14 1985		Record filed.
3	Nov 14 1985		Certified copy of original record and proceedings received. (3 volumes).
5	Nov 13 1985		Order extending time to file brief of petitioner on the merits until December 2, 1985.
6	Nov 27 1985		Joint appendix filed.
7	Nov 27 1985		Brief of petitioners Bethel Sch. Dist., et al. filed.
8	Nov 27 1985		Brief amicus curiae of Pacific Legal Foundation, et al. filed.
9	Dec 2 1985		Brief amicus curiae of National School Boards Association filed.
0	Dec 2 1985		Brief amicus curiae of Texas Council of School Attorneys filed.
1	Dec 3 1985		Brief amicus curiae of United States filed.
3	Dec 18 1985	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
4	Dec 20 1985		Brief amicus curiae of Student Press Law Center filed.
6	Jan 2 1986		Order extending time to file brief of respondent on the merits until January 13, 1986.
7	Jan 7 1986		SET FOR ARGUMENT, Monday, March 3, 1986. (3rd case).
8	Jan 13 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
9	Jan 13 1986		Brief amicus curiae of American Booksellers Assn. filed.
0	Jan 13 1986		Brief amicus curiae of National Education Assn. filed.
1	Jan 13 1986		Brief amicus curiae of Freedom to Read Foundation filed.
2	Jan 13 1986		Brief of respondent Matthew N. Fraser, etc. filed.
3	Jan 23 1986		CIRCULATED.

ry	Date	Note	Proceedings and Orders
----	------	------	------------------------

Feb 13 1986	X	Reply brief of petitioners Bethel Sch. Dist., et al. filed.	
Mar 3 1986		ARGUED.	

FILED

APR 19 1985

ALEXANDER L. STEVAS.

CLERK

NO. _____

IN THE

Supreme Court of the United States

October Term, 1984

Bethel School District No. 403;
Christy B. Ingle; David C. Rich;
J. Bruce Alexander; and
Gerald E. Hosman,

Petitioners,

v.

Matthew N. Fraser, a Minor,
and E.L. Fraser, as his
Guardian Ad Litem,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

KANE, VANDEBERG, HARTINGER
& WALKER

First Interstate Plaza
Suite 2100
Tacoma, WA 98402-4391
Telephone: (206) 383-3791

By Harold T. Hartinger
Counsel of Record

And William A. Coats
Clifford D. Foster, Jr.

1538



Petitioners BETHEL SCHOOL DISTRICT NO. 403, CHRISTY B. INGLE; DAVID C. RICH; J. BRUCE ALEXANDER; and GERALD E. HOSMAN respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 4, 1985.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the First Amendment of the Federal Constitution prohibited public school officials from imposing a three-day suspension from school on a high school student that gave a speech at an all-school assembly containing sexual innuendo, and which was considered indecent, demeaning to female students, and inappropriate by school authorities?
2. Did the Court of Appeals err in holding that a high school disciplinary rule prohibiting students from engaging

in conduct "which materially and substantially interferes with the educational process . . . , including the use of obscene, profane language or gestures," was unconstitutional on its face under the First Amendment of the Federal Constitution and the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

3. Did the District Court err in holding that failure of school district rules to define each specific form of disciplinary action that could be imposed upon a student violated the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

4. Did the District Court err in raising and deciding issues of state law sua sponte that were neither raised by the pleadings nor tried by the implicit consent of the parties?

PARTIES TO THE PROCEEDING

The parties to this proceeding, in both the United States District Court and the United States Court of Appeals for the Ninth Circuit, were Plaintiffs Matthew N. Fraser, a minor, and E.L. Fraser, as his guardian ad litem, respondents herein. The Defendants were Bethel School District No. 403, a municipal corporation, Pierce County, Washington; Christy B. Ingle; David C. Rich; J. Bruce Alexander; and Gerald E. Hosman. All of the Defendants are the Petitioners herein.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Parties to the Proceeding	iii
Opinions Below.	1
Jurisdiction.	1
Constitutional Provisions and School District Rules Involved:	2
Statement of the Case	3
Jurisdiction Below.	8
Argument for Granting the Writ. .	8
Appendix.	A-1
A. Decision of the United States Court of Appeals for the Ninth Circuit.	A-1
B. Finding of Facts and Conclusions of Law of the District Court	B-1
Oral Opinion	B-11
C. Injunction and Declara- tory Judgment.	C-1
Judgment	C-4
D. RCW 28A.58.115	D-1

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Ambach v. Norwood,</u> 441 U.S. 68 (1979)	10
<u>Black Coalition v. Portland</u> <u>School District No. 1,</u> 484 F.2d 1040 (9th Cir. 1973)	21
<u>Board of Education v. Pico,</u> 457 U.S. 853 (1982)	10,17,18, 20
<u>Esteban v. Central Missouri</u> <u>State College, 415 F.2d 1077</u> (8th Cir. 1969), <u>cert. denied,</u> 398 U.S. 965 (1970)	21
<u>Federal Communications</u> <u>Commission v. Pacifica</u> <u>Foundation, 438 U.S. 726</u> (1978)	18-20
<u>Ginsberg v. New York,</u> 390 U.S. 629 (1968)	11,16
<u>Grayned v. City of Rockford,</u> 408 U.S. 104 (1972)	22
<u>Miller v. California,</u> 413 U.S. 15 (1973)	11,15-16
<u>Murray v. West Baton Rouge</u> <u>Parish School Board,</u> 472 F.2d 438 (5th Cir. 1973)	21
<u>New Jersey v. T.L.O.,</u> 469 U.S. _____, 83 L. Ed.2d 720 (1985)	11,20, 22,24

<u>Thomas v. Board of Education,</u> 607 F.2d 1043 (2nd Cir. 1979), <u>cert. denied,</u> 444 U.S. 1081 (1980)	12
<u>Tinker v. Des Moines</u> <u>School District,</u> 393 U.S. 503 (1969).	10,12

Constitutional Provisions

U.S. Const., Amend I	2
U.S. Const., Amend XIV	2

Statutes

Wash. Rev. Code 28A.58.115	15
--------------------------------------	----

Law Review Articles

Haskell, Student Expression in the Public Schools: <u>Tinker</u> Distinguished, 59 Geo. L.J. 37 (1970)	12
---	----

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, infra), will be reported in _____ F.2d _____ (1985). The oral opinion of the United States District Court for the Western District of Washington, The Honorable Jack E. Tanner, United States District Judge, Presiding (App. B, infra), is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 4, 1985. Judgments of the United States District Court for the Western District of Washington were entered on June 8, 1983 and September 1, 1983. The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS
AND SCHOOL DISTRICT RULES INVOLVED

The constitutional provisions and school district rules at issue are as follows:

U.S. Const. Amend. I:

Congress shall make no law . . . abridging the freedom of speech. . . .

U.S. Const. Amend. XIV, § 1:

. . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Bethel High School Disruptive Conduct Rule:

In addition to the criminal acts defined above, the commission of or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.

* * *

Disruptive Conduct.
Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

STATEMENT OF THE CASE

In April of 1983, Plaintiff Matthew Fraser ("Fraser") was a 17 year old high school senior attending Bethel High School, a public school operated by the Defendant, Bethel School District No. 403, in Pierce County, Washington. On April 26, 1983, Fraser spoke on behalf of a candidate for vice president of the Associated Student Body at an all-school assembly that took place during school hours and was attended by approximately 600 students. Students were required to attend either the assembly or a study hall.

The entire text of Fraser's speech is as follows:

I know a man who is firm--he's firm in his pants, he's firm in his shirt, his character is firm--but most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally--he succeeds.

Jeff is a man who will go to the very end--even the climax, for each and every one of you.

So vote for Jeff for ASB Vice President--he'll never come between you and the best our high school can be.

Fraser testified he deliberately used sexual innuendo in his speech in hopes that students would perceive its sexual references. During the speech, a school counselor observed students reacting with hooting and yelling, and one male student was observed simulating masturbation. Two other students were observed

simulating sexual intercourse by movement of their hips.

The following day, several teachers delivered written statements to the school principal complaining about the speech. Other teachers reported that the educational process was further disrupted during their classes the following day because of student reaction to the speech, including indignation and embarrassment. An independent educational expert also testified at trial that the speech was sexually harassing to female students and disruptive to the learning process.

On the morning after the speech, Fraser was given oral and written notice that the District believed he had violated the School's disruptive conduct rule. Fraser was also given copies of the written evidence school officials had concerning the allegations against him

and an opportunity to explain the circumstances surrounding his behavior at the assembly. After these discussions, Fraser was informed that his speech had violated the School's disruptive conduct rule, that he would be suspended from school for three days, and that his name would be removed from consideration as a candidate for graduation speaker at the upcoming commencement ceremony.

This litigation followed with a complaint alleging federal constitutional and civil rights claims under 42 U.S.C. § 1983 was filed on May 23, 1983. After a one-half day hearing on May 31, 1983, the United States District for the Western District of Washington, the Honorable Jack E. Tanner presiding, ruled that (1) the suspension violated Fraser's rights of free expression under the First Amendment of the Federal Constitution, (2) the school's disruptive conduct rule

was unconstitutionally vague and overly broad, (3) the failure of the disciplinary rules to specify removal of names from the candidate's list for graduation violated due process, and (4), sua sponte, the suspension violated state law. The Court also announced that an injunction would issue requiring the District to allow Fraser to speak at the Bethel High School commencement exercises.

On June 8, 1983, the District Court issued findings of facts and conclusions of law, an injunction, and a declaratory judgment. On September 1, 1983, the District Court entered a final judgment awarding Fraser damages, costs, and attorneys' fees. The District timely perfected an appeal to the United States Court of Appeals for the Ninth Circuit.

On March 4, 1985, a three-judge panel of the Ninth Circuit issued an

opinion affirming the judgment of the District Court, with The Honorable Eugene A. Wright dissenting.

EXISTENCE OF JURISDICTION BELOW

The Respondent initiated this action in the United States District Court on May 23, 1983, pursuant to 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit invoked 28 U.S.C. § 1291 for jurisdiction to hear the District's appeal.

ARGUMENT FOR GRANTING THE WRIT

The Court of Appeals' opinion frustrates the authority of public school officials to maintain community standards of decency and civility in the nation's public schools. Prior decisions of this Court recognize that the public school environment requires a delicate accommodation between the constitutional rights of students and a state's compelling interests in providing an education,

including promotion of respect for authority and the community's moral values.

The Court of Appeals' decision, however, creates a novel First Amendment "right" for students to express themselves in a sexually offensive and indecent manner, subjects school disciplinary rules to the same due process standards for vagueness and overbreadth as criminal statutes, and threatens to interject the federal judiciary into the daily operation of the public schools. This petition should be granted because the lower courts' decisions not only conflict with the applicable decisions of this Court and other Courts of Appeals, but also involve important, and unsettled issues of federal law concerning the free speech rights of students and school disciplinary rules that ought to be resolved by this Court.

Prior decisions of this Court have repeatedly emphasized that local school boards and school officials possess broad and comprehensive management authority over the conduct of students in the public schools. Board of Education v. Pico, 457 U.S. 853, 863-65 (1982); Tinker v. Des Moines School District, 393 U.S. 503 (1969). These decisions also recognize that the inculcation of community values, including social and moral values, are legitimate and essential goals of public education. Board of Education v. Pico, supra, 457 U.S. at 864-69; Ambach v. Norwood, 441 U.S. 68, 76-77 (1979). To be sure, the discretionary authority of school officials does not transcend the limitations of the Federal Constitution. Nevertheless, the unique demands placed upon the state in its role as educator, including the need to maintain an environment in which

learning and social maturation can occur, require certain limitations on the constitutional rights of students. As noted in New Jersey v. T.L.O., 469 U.S. _____, 83 L. Ed.2d 720 (1985), maintenance of a proper educational environment allows the constitutional "enforcement of rules against conduct [by students] that would be perfectly permissible if undertaken by an adult." 83 L. Ed.2d at 733.

In the present case, however, the Court of Appeals has rendered school officials powerless to discipline a student's manner of expression absent a showing the speech either caused a physical disruption of the educational process or was "obscene" under the standards of cases such as Miller v. California, 413 U.S. 15 (1973) and Ginsberg v. New York, 390 U.S. 629 (1968).

The majority's analysis misapplied this Court's landmark holding in Tinker v. Des Moines School District, supra. Tinker's recognition that school officials may curtail the exercise of student speech if a reasonable forecast of substantial disruption to the educational process can be made did not address the problem of indecent or profane language. Indeed, Tinker is analytically unsuited to weigh properly the constitutional values and educational interests at stake in such cases. Thomas v. Board of Education, 607 F.2d 1043, 1055 (2nd Cir. 1979) (Newman, J., concurring), cert. denied, 444 U.S. 1081 (1980); Haskell, Student Expression in the Public Schools: Tinker Distinguished, 59 Geo. L.J. 37, 49 (1970). Further, the Court of Appeals erroneously viewed Tinker's material disruption standard to require uncontrollable student behavior, such as

a riot or interference with school schedules. App. A., A-15 to 16. The opinion ignores the less tangible disruptions of the educational process, such as the demeaning and disruptive effect Fraser's speech had on female students' learning environment, that occur daily in our public schools and have traditionally warranted disciplinary action without oversight by federal judges.

The Court of Appeals also rejected the constitutional authority of school officials to regulate offensive and indecent student speech based upon the need to preserve the integrity of the learning process and to protect the sensibilities of other students. App. A, A-22 to A-32. The lower courts' analyses equate a school's efforts to maintain and promote standards of decency and civility in the narrow confines of the school

grounds and school day with the constitutional requirements imposed upon a state or local government when it seeks to suppress completely the dissemination of sexually oriented materials to the public. Surely, school district authorities have greater authority to regulate the speech of students in the school environment than the state possesses in dealing with pornographers, especially when the objectionable speech occurs before a captive audience of 14 to 18 years old at a mandatory school assembly.

By denying school officials power to regulate student speech deemed indecent, the Court of Appeals' decision, as a practical matter, also prevents any meaningful regulation of sexually suggestive or crude language by students. The majority opinion found that Bethel High School's disruptive conduct rule was unconstitutional on its face:

It follows from our First Amendment Analysis that we must also affirm Judge Tanner's declaration that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent' even when engaged in extracurricular activity. . . .¹

App. A, A-43, n.12.

To satisfy this facial overbreadth standard, school rules designed to regulate use of indecent language by students at school would have to define specifically the types of sexual conduct or language prohibited. Miller v.

¹The majority opinion's characterization of the assembly as "extracurricular" is factually and legally unsupported. The assembly occurred at school, during school hours, and attendance at the assembly or a study hall was mandatory. The school's Associated Student Body, which the campaign speeches concerned, is by state statute subject to the control of the District. RCW 28A.58.115, reprinted in App. D.

California, supra, 413 U.S. at 24. If this were the law, a specific description of prohibited language or sexual conduct would have to be set forth in each student's rule book. This would (1) set an inflexible standard unduly limiting school officials' discretion, (2) tempt students to engage in otherwise offensive, but undefined conduct, and (3) be offensive and shocking in itself to many students and parents. See, e.g., Ginsberg v. New York, supra, 390 U.S. at 645-46 (1968) (specific definitions of prohibited materials). Indeed, the rule at issue, as in most public schools, appears in handbooks for children as young as 12 years old. Because the majority's opinion deprives public school officials of the authority to deal with indecent student speech absent a showing of "obscenity," and because school district rules cannot be drafted with the

specificity required by this Court's obscenity decisions, public schools will be powerless to deal with indecent student speech or behavior.²

The First Amendment constraints the Court of Appeals imposes on public school officials also conflicts with this Court's recognition that school authorities may regulate the manner of expression of ideas in the school environment for educational reasons unless the motivating factor for a particular action is disagreement with the ideas affected or an intent to impose a political orthodoxy upon the students. In Board of Education v. Pico, supra, all of the

²The Ninth Circuit's decision will force school officials to stop conducting assemblies with student speakers if a student's use of indecent language or manner of expression is beyond the pale of constitutionally sound disciplinary action.

opinions filed recognized school officials' authority to make decisions based upon factors such as educational suitability or decency when deciding to remove books from the school library, absent proof that the motivating factor for a decision was decisively based on disagreement with the ideas expressed in the particular books. Clearly, school authorities retain discretionary authority to regulate student behavior on the basis that it is indecent, vulgar, or educationally unsuitable.

The Petitioners submit that the analysis suggested by Pico and by Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) accommodates student rights of free expression with the legitimate educational demands of the school environment. The Court of Appeals' fear that allowing school officials the constitutional authority to

regulate indecent speech is a too amorphous standard can be resolved by holding that such regulation is permissible, absent a showing that the school's action was actually motivated by a desire to suppress the expression of ideas. Such a standard preserves school officials' authority to maintain standards of civility and decency within the captive confines of the school environment while protecting the full spectrum of ideas against official suppression. As stated in Federal Communications Commission v. Pacifica Foundation, supra, "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." Id. at 743, n. 18. Given the undeniable importance of preserving decency and decorum

in the public schools, a constitutional analysis of indecent student speech based upon Pico and Pacifica would provide much needed guidance to public school officials throughout the nation.

Equally significant is the Court of Appeals' affirmation of the District Court's holding that school district disciplinary rules are subject to the same due process standards for vagueness and overbreadth as criminal statutes. As noted in New Jersey v. T.L.O., supra, school disciplinary rules must be capable of addressing a myriad of circumstances that require prompt and effective disciplinary action.

School discipline helps teach students minimum standards of behavior for both the classroom and society. Rules and disciplinary procedures, moreover, are typically developed by local school boards with the active

participation of concerned parents, school officials, and members of the community, and reflect the community's expectations for socially acceptable conduct. Disciplinary rules furthering those legitimate educational and community goals must be reviewed in light of the unique requirements of the school environment, and, indeed, circuit courts addressing this question have refused to apply criminal vagueness and overbreadth standard to school disciplinary rules. E.g., Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973); Esteban v. Central Missouri State College, 415 F.2d 1077, 1087-89 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 442 (5th Cir. 1973).

To impose the Court of Appeals' and District Court's criminal statute stan-

dard of review for school disciplinary rules would threaten the enforceability of most, if not all, disciplinary rules in effect in the public schools. This Court should grant review to resolve the conflict created over the appropriate due process standard for reviewing school disciplinary rules and hold that Bethel High School's disruptive conduct rule gave fair and constitutionally sound notice of proscribed conduct within the school environment. See Grayned v. City of Rockford, 408 U.S. 104, 112 (1972).³

³ Similar considerations warrant this Court's review of the District Court's holding that the District's failure to specify all forms of possible punishment for a violation of school rules violated Fraser's due process rights under the Fourteenth Amendment. As recognized in New Jersey v. T.L.O., *supra*, the preservation of order in the educational environment requires flexibility in school disciplinary procedures. 83 L. Ed.2d at 733. By requiring each form of potential punishment to be spelled out in

The Court of Appeals' decision, then, conflicts with the prior decisions of this Court and other federal circuit courts of appeals in both its analysis of student free speech rights in the school environment and the application of due process standards for criminal statutes' overbreadth and specificity to school disciplinary rules. These issues are matters of undeniable public concern and involve important questions of federal constitutional law that should be settled definitively by this Court.

Continuation of Fn.3:

a disciplinary rule, the District Court's analysis frustrates that goal. Concerning the District Court's sua sponte ruling on state law, which was unaddressed by the Court of Appeals, the decision implicitly sanctioned a departure so far removed from the accepted and usual course of judicial proceedings by the District Court that this Court's power of supervision should be exercised pursuant to Sup.Ct.R. 17.1.(a).

Our nation's public schools are currently undergoing unprecedented public scrutiny and a widely shared, and often well-founded, perception exists that school authorities are unable to maintain order and discipline within the school environment, let alone provide quality education to the nation's young. See, e.g., New Jersey v. T.L.O., supra, 83 L. Ed.2d at 733. The Court of Appeals' decision sanctions an unprecedented judicial intrusion into the day-to-day operation of a public school, and seriously undermines the authority of educators to fulfill the public's expectations of decency and order in the educational system.

Absent a showing that the decisive factor in a disciplinary action was an intent to suppress ideas, the compelling governmental and educational interests of maintaining standards of civility and

decency in the school environment are more constitutionally significant than an adolescent's choice of indecent means to express himself. This Court should grant review and clearly hold that school authorities do indeed retain authority to regulate indecent speech by students under disciplinary rules drafted for the unique needs of the school environment.

DATED this 18th day of April, 1985.

KANE, VANDEBERG, HARTINGER
& WALKER

Harold T. Hartinger

William A. Coats

Clifford D. Foster

By


HAROLD T. HARTINGER

Of Attorneys for Petitioners



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW N. FRASER, a)	
minor, and E.L. FRASER,)	
as his Guardian Ad Litem,)	
	)	NO. 83-3987
Plaintiffs-	)	NO. 83-4142
Appellees,	)	D.C. NO.
	)	CV 83-306T
v.)	
)	
BETHEL SCHOOL DISTRICT	)	OPINION
NO. 403; CHRISTY B.)	
INGLE; DAVID C. RICH;)	
J. BRUCE ALEXANDER; and)	
GERALD E. HOSMAN,)	
)	
Defendants-)	
Appellants.)	

Appeal from the United States
District Court for the
Western District of Washington
Honorable Jack E. Tanner
U.S. District Judge, Presiding

Argued and Submitted
March 7, 1984

BEFORE: WRIGHT, GOODWIN and NORRIS,
Circuit Judges.

NORRIS, Circuit Judge:

Bethel School District appeals a
judgment for declaratory and injunctive
relief, damages, and \$12,750 costs and

attorney fees in this civil rights action brought under 42 U.S.C. § 1983 by a student who claimed that the District had abridged his freedom of speech as protected by the First and Fourteenth Amendments. We affirm.

I

On April 26, 1983, appellee Matthew N. Fraser, then a seventeen-year-old senior at Bethel High School in Tacoma, Washington, nominated a friend and classmate for school office at a student-run assembly called for that purpose. The following is the entire text of Fraser's nominating speech:

"I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard,

pushing and pushing until finally - succeeds.

Jeff is a man who will go to the very end - even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president - he'll never come between you and the best our high school can be."

The day after he delivered the speech, Fraser was asked to report to the assistant principal's office and to produce a copy of the text of his speech. At the meeting, Fraser was given notice that he was being charged with violating

the school's disruptive conduct rule.¹
 After he was given an opportunity to explain his conduct, he was suspended for three days. Fraser, who was a member of the Honor Society and the debate team and the recipient of the "Top Speaker" award in statewide debate championships for two consecutive years, was also informed that his name would be removed from a

-
1. The rule, which was published in the school's student handbook, states:

In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.

...

Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

previously approved list of candidates on the ballot for graduation speaker. Even though his name was stricken from the ballot, he was elected graduation speaker by his classmates on a write-in vote, receiving the second highest number of votes cast. The District, nevertheless, continued to deny him permission to speak.

Fraser initiated a grievance of the disciplinary action by making a submission to the Superintendent of the Bethel School District. After the grievance was denied, Fraser, joined by his father as guardian ad litem, filed this civil rights action. After an evidentiary hearing at which the school principal, two assistant principals, several teachers and Fraser all testified, Judge Tanner issued a declaratory judgment that the School District violated Fraser's rights under the First and Fourteenth

Amendments under the United States Constitution and the Civil Rights Act by subjecting him to a three-day suspension and removing his name from the list of candidates for the graduation speaker, and that the punishment imposed upon Fraser was null and void. Judge Tanner also enjoined the District from refusing to allow Fraser to participate in Bethel High School's commencement exercises as a graduation speaker and awarded Fraser \$278 as damages and \$12,750 as costs and attorney's fees. The District invokes our jurisdiction to hear its appeal under 28 U.S.C. § 1291.

Before we address the District's arguments on appeal, we think it is helpful to review a few basic principles of First Amendment jurisprudence. It is well established that high school students do not "shed their constitutional rights to freedom of speech or expression

at the schoolhouse gate." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969). It is also well established, however, that a student's First Amendment rights are not absolute; the limits of a student's right to express himself must be defined in light of the special characteristics of the school environment. Id. at 506. As our court said in Nicholson v. Board of Education, 682 F.2d 858 (9th Cir. 1982), "In the high school setting, school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students." Id. at 863. The discretion of school authorities in managing school affairs is necessarily limited, however, by "the imperatives of the First Amendment." Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion).

Under Tinker and its progeny, "school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech, and ... courts will not rest content with officials' bare allegation that such a basis existed.'" Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977) quoting Eisner v. Stamford Board of Education, 440 F.2d 803, 810 (2d Cir. 1971). See also, Scoville v. Board of Education, 425 F.2d 10, 13 (7th Cir.), cert. denied, 400 U.S. 826 (1970). Under our Constitution, it is the role of the judicial branch of government to resolve First Amendment controversies between students and public school officials such as the one between Matthew Fraser and the Bethel School District. A celebrated case in point is West Virginia v. Barnette, 319 U.S. 624 (1943), where the Supreme Court was called upon to decide whether a public

school student could be compelled to salute the flag. Ruling in favor of the student, the Court, speaking through Justice Jackson, said:

"The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures -- Boards of Education not excepted. These have, of course, important delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

Id. at 637.

We must address three basic arguments made by the District in support of its claim on appeal that the disciplinary action did not abridge Fraser's constitutional rights: (1) The District may discipline Fraser because the nominating speech had a disruptive effect on the educational process of the school; (2) the District's interest in maintaining a level of civility at the school justified its disciplinary action against Fraser

for using language which school officials consider to be indecent; and (3) the District may discipline Fraser for using language considered to be objectionable because the speech was made at a school-sponsored function and was an extension of the school program. We will consider each argument in turn.²

-
2. The question whether Fraser's First Amendment rights were violated is a mixed question of law and fact since it requires us to apply principles of First Amendment jurisprudence to the specific facts of this case. The appropriate standard of review is de novo because, as we said in United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984), "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights." Id. at 1202-03.

II

We agree with the District that the First Amendment does not prohibit school officials from disciplining a student who materially disrupts the educational process. As the Supreme Court said in Tinker, student speech or conduct is "not immunized by the constitutional guarantee of freedom of speech" if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513.

Tinker involved three high school students who were suspended for continuing to wear black armbands as a symbolic protest against the war in Vietnam after being asked to remove them. The Supreme Court held that the suspension violated the students' First Amendment rights because the school district failed to establish that the black armbands had a disruptive effect of the operations of

the school or that the school officials had reason to anticipate that the armbands would cause a disruption. The Tinker Court ruled that the students' Constitutional right to protest the war by wearing black armbands could not be infringed because there were no "facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." Id. at 514.

Just as in Tinker, the Bethel School District has failed to carry its burden of demonstrating that Fraser's use of sexual innuendo in the nominating speech substantially disrupted or materially interfered in any way with the educational process. In support of its contention that the speech was disruptive, the District cites the testimony of

Gary McCutcheon, a school counselor who testified that some students at the assembly reacted to Fraser's speech with "hooting and yelling." Appellant's Brief at 3. Mr. McCutcheon testified as follows:

Q: Let's first go with what did you hear from the student body?

A: Not too dissimilar to what Mrs. Hicks just reported, the students were pockets of high volume conversations, hooting, yelling, which is not atypical to a high school auditorium assembly and the auditory, the sounds were not too dissimilar to any auditorium sounds I have heard over the many assemblies I have been at Bethel High School.

Q: Were there physical activities as well?

A: I think of particular interest might be perhaps was something I hadn't seen before. I had seen one student on the side of the bleachers where I was sitting actually simulate masturbation and two students on the opposite bleachers were simulating the sexual intercourse movement with hips.

Q: Can you show us what you mean?

A: I prefer not to.

Q: I will defer to that, was there any student reaction to all of this other than the ones that were hooting?

A: Student reaction to the three cases I mentioned?

Q: Some students were hooting and some students were acting out, were all of the students doing that?

A: No, one student in the first case and two students in the opposite bleachers in the second case. That is the only three I noticed that were doing anything that was different.

Q: Did you note any student reaction to this conduct?

A: I think -- gee, I can't pinpoint it, I say in general a couple of students around that particular three individuals were getting more aroused volume wise with their voice, I would say.

That testimony is the only evidence that the District cites in its brief in support of its contention that Fraser's speech disrupted the assembly.

The record also contains the testimony of Irene Hicks, a teacher who also

heard the speech. She described the student reaction as follows:

A: The best way to describe it, I think, is mixed. There were pockets of loud clapping, hoots and hollering and then there were other students that were sitting there, I guess my best words to describe it is as rather bewildered, not understanding what the kids were clapping about and why there was such a difference in reception to the speech.

...

A: The kids were, as I said, some were just kind of bewildered and the others were just saying, yahoo, wonderful, we are all for it, great.

Thus, what the evidence demonstrates is that Fraser's speech evoked a lively and noisy response from the students, including applause, and that a few of the students reacted with sexually suggestive movements. The administration had no difficulty in maintaining order during the assembly and Fraser's speech did not delay the assembly program. Fraser was

the second to last speaker, followed by his candidate, Jeff Kuhlman, who then made the final speech of the afternoon without incident. The assembly, which took place after the last school class of the day, was dismissed on schedule.

The only other evidence cited by the District to support its claim that the speech was disruptive of the educational process is the testimony of Debbie Carmandi, a home economics teacher, who said that during class the next day the students expressed so much interest in Fraser's speech that she devoted approximately ten minutes to a discussion of it. Judge Tanner summarized her testimony as follows: "On the day after the speech was delivered, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher

then invited a class discussion of the speech." Finding of Fact No. 5.

Given the evidence before us, we fail to see how we can distinguish this case from Tinker on the issue of disruption. Just as the record in Tinker failed to yield evidence that the wearing of black armbands resulted in a material interference with school activity, the record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly disruptive of the educational process. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body "was not atypical to a high school auditorium assembly." In our view, a noisy response

to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser's First Amendment right to express himself freely.

We find it significant that although four teachers delivered written statements to an assistant principal commenting on Fraser's speech, none of them suggested that the speech disrupted the assembly or otherwise interfered with school activities.³ See, Finding of Fact No. 8. Nor can a finding of material disruption be based upon the evidence that the speech proved to be a lively

3. Three of the teachers disapproved of the speech as "inappropriate" for a high school assembly. The fourth found nothing offensive about it.

topic of conversation among students the following day.

We recognize that the principal, assistant principals and some teachers thought that Fraser's speech was inappropriate for a school assembly because of

what they considered to be sexually explicit language.⁴ In response to questioning by Judge Tanner, both the principal, David Rich, and the assistant principal, Lee Morrison, testified that in their view the word "inappropriate" was synonymous with the word "disruptive" in the school context. The mere fact that some members of the school community considered Fraser's speech to be inappropriate does not necessarily mean it was disruptive of the educational process. The First Amendment standard Tinker requires us to apply is material disruption, not inappropriateness. As the Supreme Court said in Tinker

4. There is no evidence in the record indicating that any students found the speech to be offensive. Fraser was the only student to testify.

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508. Thus, we conclude that the District has failed to demonstrate that the speech had a materially disruptive effect on the educational process.

III

The District's second major argument is that regardless whether the speech was disruptive, it is not prohibited by the First Amendment from disciplining Fraser for using ~~sexual~~ references which, in the opinion of school officials, made the

speech "indecent."⁵ The thrust of this argument is that school officials have a legitimate interest in protecting teachers and students from speech deemed to be offensive and that this interest outweighs Fraser's interest in using sexual innuendo in his speech. In making this argument, the District relies heavily on

-
5. It is well settled that speech that is legally obscene does not qualify for First Amendment protection. See Roth v. United States, 354 U.S. 476 (1957). The District does not contend, however, that Fraser's speech was obscene. To decide whether an expression is obscene, a trier of fact determines "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978), and the concurring opinion of Judge Newman in Thomas v. Board of Education, 607 F.2d 1043 (2d Cir. 1979).

In Pacifica, the Supreme Court held that the First Amendment did not prohibit the Federal Communications Commission from regulating a radio broadcast that the Commission and a majority of the Court deemed to be indecent, although not obscene. Specifically, the Court upheld a Commission order declaring that a radio broadcast of George Carlin's "Filthy Words" monologue was indecent within the meaning of 18 U.S.C. §1464.⁶ In upholding the Commission's order against constitutional attack, the Supreme Court emphasized that of all forms of communication, broadcasting has received the most limited First Amendment protection for two principal reasons: (1) broad-

casting intrudes directly on the privacy of an unwilling listener while he or she is at home, 438 U.S. at 748; and (2) broadcasting is uniquely available to unsupervised children, even those too young to read. Id. at 749.

In Thomas, 607 F.2d 1043 (2d Cir. 1979), the Second Circuit held that the First Amendment rendered school officials powerless to discipline students for publishing an off-campus newspaper specializing in sexual satire. Because the students' on-campus activity in publishing and distributing the newspaper was de minimis, the majority in Thomas did not reach the question whether the

-
6. 18 U.S.C. §1464 provides, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

students could have been punished for distributing the newspaper on campus. Id. at 1050. That question, however, was discussed by Judge Newman in his separate concurring opinion. Id. at 1053. The District argues that we should adopt the view expressed by Judge Newman that the doctrine of Pacifica should be extended to the high school context.⁷ Relying upon Pacifica, Judge Newman reasoned, "If

7. Judge Kaufmann, writing for the majority in Thomas, disagreed with Judge Newman that the issue of on-campus distribution of the newspaper was before the court. Judge Kaufmann, nevertheless, questioned the soundness of Judge Newman's view on the issue of on-campus distribution: "We would hesitate, however, to conclude that the obvious need for a flexible application of the First Amendment in the school setting allows educational officials free-wheeling and unbridled discretion to prohibit expression they regard as indecent, even with the narrow confines of the schoolhouse." Id. at 1052 n.18.

the F.C.C. can act to keep indecent language off the afternoon airwaves, a school can act to keep indecent language from circulating on high school grounds." Id. at 1057.

Thus, we are asked by the District to expand the doctrine of Pacifica beyond the context of broadcasting to the school environment. We believe the relevant inquiry is whether the Supreme Court's rationales for sanctioning government regulation of "indecent" speech in broadcasting are applicable to a high school assembly convened for the express purpose of providing a forum for students to make campaign speeches.

The Supreme Court's first rationale in Pacifica -- that broadcasting can be very intrusive upon the privacy of the home -- is plainly inapplicable to a high school assembly. High school students voluntarily attending an assembly to hear

student campaign speeches surely do not expect the same measure of privacy and protection from unwelcome language and ideas that they obviously do at home. A high school assembly is a very public place. In contrast, the Constitution treats homes as special sanctuaries for privacy. As the Supreme Court said in Cohen v. California, 403 U.S. 15, (1971):⁸

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue ..., we have at the same time consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to objectionable speech."

-
8. The Supreme Court held in Cohen that under the First Amendment a state could not make it a criminal offense to wear a jacket in a courthouse bearing the words "Fuck the Draft." 403 U.S. at 26.

Id. at 21 (citations omitted).

The Supreme Court's second rationale in Pacifica -- that broadcasting routinely reaches impressionable young children -- is also inapplicable to a high school assembly. Fraser was not talking to children too young to read; he was speaking to young adults, many of whom as high school seniors on the eve of graduation would have already reached voting age. Realistically, high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives. Although we may be offended by some of what we see and hear, that is a price we must pay for the privilege of living in a free and open pluralistic society.

Thus, we hold that the rationales of Pacifica have no applicability to the high school environment, especially to an

assembly convened for student political speech-making. It is one thing to apply a standard of "indecentcy" to restrict the First Amendment protection of broadcasting out of concern for the privacy of the home and impressionable young children; it would be quite another to give school officials discretion to apply the amorphous standard of "indecentcy" to restrict the First Amendment freedoms of high school seniors' making campaign speeches for student office. We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as "indecentcy" in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools. Language that may be considered "indecent" in one segment of our

heterogeneous society may be common, household usage in another. Freedom to be different in our individual manner of expression is a core constitutional value; the First Amendment reflects the considered judgment of our Founding Fathers that government officials, including public school administrators and, for that matter, judges, should not be permitted to use their power to control individual self-expression.

Matthew Fraser testified that he knowingly used "sexual innuendo" in his speech nominating Jeff Kuhlman for school office. As Judge Tanner found, Fraser did so because he thought it would be effective to establish a rapport with his fellow students, and perhaps to amuse them. Whether he succeeded or whether he went over the line of good taste and became offensive is for his fellow students to judge when they cast their

ballots in the school elections.⁹ Thus, we decline to expand the doctrine of Pacifica to give public school officials power to regulate the speech of high school students they consider to be indecent.¹⁰ Accordingly, we hold that the First Amendment prohibited the District from punishing Fraser for making a speech that school officials considered to be "indecent."

9. Fraser's candidate went on to win the election.

10. We do not have to reach the question whether a school board may refuse to make books or other instructional materials available to students because they contain language deemed to be offensive. See Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring).

IV

In addition to relying on Pacifica and Judge Newman's concurring opinion in Tinker, the District cites a number of other cases as authority for the general proposition that school officials may control the language used to convey ideas at school-sponsored events.¹¹ In essence, the District argues that because school officials can control the agenda and subject matter of school-sponsored assemblies, they can regulate the speech of students who participate in the assemblies and can punish students for language that they find objectionable.

11. In support of its contention that the assembly was sponsored by the school, the District argues that the student body election for which Fraser was giving his speech is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district" Wash. Rev. Code §28A.58.115.

That school officials have broad discretion to control the content of the school curriculum cannot be disputed. See Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982). Although Fraser delivered his speech to a school-sponsored assembly, his speech was clearly not part of the school curriculum. The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.

Because this case does not involve the compulsory environment of the classroom, we find the District's reliance on Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982), to be puzzling. In Island

Trees, the Supreme Court held that a local school board's discretion to determine the content of its school libraries is limited by the imperatives of the First Amendment. The Court remanded the case for trial to determine the reasons behind the school board's removal of certain books from the library because "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" Id. at 872 (quoting West Virginia Board of Education v. Barnette, 319 U.S. at 642). The Bethel School District's reliance on Island Trees is clearly misplaced because, as Justice Brennan said speaking for the plurality, school boards may not "extend their claim of

absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." Id. at 869. A fortiori, a voluntary student election assembly is even further removed from the "compulsory environment of the classroom" than a library. Similarly, in Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2d Cir. 1980), also relied upon by the school district, the court recognized that the First Amendment imposes fewer restrictions on a school board's discretion to choose materials for the school program than to regulate a student's right of expression. Id. at 441 n.3.

The case before us is also distinguishable from Nicholson, where we held that students in a journalism class that produces a school newspaper do not have a constitutional right to be free from

prepublication review by the school principal. 682 F.2d at 863. Nicholson did involve the compulsory environment of the classroom. The publication of the newspaper was part of a journalism class in which students were being taught how to be journalists. As we explained, "[T]he school possessed a substantial educational interest in teaching young, student writers journalistic skills which stressed accuracy and fairness." Id. Indeed, in Nicholson we explicitly pointed out that school officials had much greater latitude in reviewing a student publication that was part of the curriculum than in the case of a student newspaper that was an extra-curricular activity. In the latter case, we said that such "outright censoring or prohibition would require a strong showing on the part of school administrators that publication of that forbidden materials

would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" Id. at 863 n.3 (quoting Tinker, 393 U.S. at 509).

The voluntary, student-run assembly which Fraser addressed was clearly an extra-curricular activity, not part of the school curriculum. The assembly was in the best sense a student activity; the candidates and their nominators were on their own, free to exercise their individual judgments about the content of their speeches. In exercising his First Amendment rights at the assembly, Fraser was as free to express himself as if the students had organized a campaign rally in the cafeteria or outside on the school steps. See Tinker, 393 U.S. at 512-13 ("When [a student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may

express his opinions, even on controversial subjects like conflict in Vietnam").

The other cases cited by the District are also inapposite. In Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981), for example, the Third Circuit explicitly distinguished the superintendent's permissible decision to cancel a drama class' production of "Pippin" from the constitutionally impermissible censoring of "non-program related expressions of student opinion." Id. at 216. The District's reliance on Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), where school officials restrained students' efforts to distribute a sex questionnaire, is also misplaced. The narrow question before the Second Circuit was whether the school officials made an adequate showing to justify their prohibition of the distribution of the

questionnaire. The court held that the record established a substantial basis for defendants' belief that distribution of the questionnaire would result in emotional harm to students. Id. at 520. There simply has been no such showing here.

When Fraser delivered his nominating speech to fellow students who were assembled for the explicit purpose of exchanging ideas and information about candidates for school office, he spoke under the protective cloak of the First Amendment. As the Supreme Court said in Keyishian v. Board of Regents, 385 U.S. 589 (1967):

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, [364 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that

robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

Id. at 603. Just as in the political world outside the school, the First Amendment requires that the principal restraint on the choice of words and ideas in political dialogue is the risk of disapproval by the audience the speaker hopes to influence.

To their credit, Bethel High School officials created an open forum for students to express their political views; when they did so, they implicated the fundamental right of participation in the process of self-government, albeit a student government. The school officials are to be commended for giving the students an opportunity to gain practical experience in the democratic process. That is exactly what Fraser was doing. He made a personal judgment when he chose

to use sexual innuendo in his speech. It may have been politically risky to do so, but the decision was his and his alone to make. As long as the speech was neither obscene nor disruptive, the First Amendment protects him from punishment by school officials. As Justice Jackson said, "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia v. Barnette, 319 U.S. at 637. In conclusion, we hold that the District violated Fraser's First Amendment rights when it disciplined him for the language and verbal imagery he used in nominating

his candidate for office.¹²

The declaratory judgment and the award of attorney's fees and costs are AFFIRMED. Because the injunction served its purpose of assuring that Fraser qualified as a commencement speaker, it is VACATED as moot.¹³

12. It follows from our First Amendment analysis that we must also affirm Judge Tanner's declaration that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be "indecent" even when engaged in an extra-curricular activity. See infra note 1. Because we decide the case on First Amendment grounds, we need not review Judge Tanner's ruling that the District's action in removing Fraser's name as a graduation speaker violated his Fourteenth Amendment right to due process of law.

13. Fraser delivered a graduation speech without incident.

Fraser v. Bethel School District No. 403

- Nos. 83-3987/4142

Eugene A. Wright, dissenting:

The court holds today that school authorities are powerless to discipline a student who makes a crude and sexually suggestive speech during a school assembly. It further holds that the authorities had no choice but to allow the same student to address an audience of children, parents and distinguished community members in the school commencement exercises.

I dissent because the majority improperly usurps the authority of school officials to maintain and enforce minimum standards of decency in public schools. The court ignores the "delicate accommodation" necessary to insure that First Amendment freedoms coexist with

institutional needs. Thomas v. Board of Education, 607 F.2d 1043, 1049 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980), on remand, 505 F. Supp. 102 (N.D.N.Y. 1981). Further, it misunderstands and misapplies Tinker's "substantial disruption" standard in the context of indecent expression.

The facts are recounted in the majority's opinion. I add a few details to bring the majority's mistakes into sharper focus.

Fraser was a 17-year-old senior at Bethel High School when the incidents underlying this action occurred. The school is in Spanaway, Washington, a suburban community close to Tacoma. The community also is home to Pacific Lutheran University, a small, private university. Bethel High School is the only senior high school within the jurisdiction of defendant Bethel School District

No. 403. The events occurring there understandably engage the full attention of the local school board.

Fraser gave his speech during an assembly in the school auditorium. It was held during school hours and was attended by over 600 students and teachers. Attendance at the assembly was mandatory unless students preferred to study in the study hall. The assembly and the student elections associated with it were part of the official school curriculum, designed to teach rhetoric and leadership.

Fraser's speech used deliberate sexual innuendo in an effort to shock and excite his audience. It received its intended response. Students reacted with hooting and yelling. One student was observed simulating masturbation. Others simulated intercourse. Teachers noted

that some students were shocked and embarrassed.

The following day, several teachers complained to the principal that the speech was inappropriate in a school assembly. Several also complained that their classes were disrupted the day following the speech because of heated student reaction.

This court should begin with a presumption against judicial involvement in the schools. "[C]ourts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts." Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 868 (1982) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). See

also Nicholson v. Board of Education, 682 F.2d 858, 863 (9th Cir. 1982).

Of course, neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969). Nevertheless, courts have largely recognized that schools are different from other public forums. Speech that would be protected on the street corner does not automatically deserve protection in the classroom or auditorium. Bender v. Williamsport Area School District, 741 F.2d 538, 560 (3rd Cir. 1984) (free speech right of students dramatically different than the right to communicate in a traditional public forum).

As one commentator notes, "[t]he school environment is unique due to its physically confining nature, the

immaturity of its population, and the special demands and needs of the educational purpose." Haskell, Student Expression in the Public Schools: Tinker Distinguished, 59 Geo. L.J. 37, 57-58 (1970). See also Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 Tex. L. Rev. 477, 496-510 (1981). The factors that make schools unique for First Amendment purposes are all relevant here. The majority erred in failing to address them.

The first difference is the physically confining nature of schools. The Supreme Court has noted on several occasions that government may protect a captive audience from being unwilling auditors of offensive speech, at least in those places that we consider sanctuaries. Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726,

748-49 & n.27 (1978); id. at 759 (Powell, J., concurring); Rowan v. United States Post Office Dept., 397 U.S. 728, 736-38 (1970). The captive audience problems were magnified here, because school rules required students to attend the assembly or study halls. Students had no ability to walk away from the offending speech. Cf. Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975). Nor did they have any indication that speeches containing sexual innuendo would take place.

Second, it is constitutionally significant that Fraser's speech was made by a minor to other minors. While children clearly have some First Amendment rights, these rights differ in important respects from the rights enjoyed by adults. See generally, Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321 (1979). As the Supreme Court noted, "[t]he world of

children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules.'" Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968) (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938, 939 (1963)). At home, parents are allowed to impose considerable restraints on their children's rights to "free expression." At school, the school authorities stand in loco parentis to enforce minimum standards of expression. See New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985) (reasonableness standard governs school searches).

Similarly, schools may act to protect the children from obscene or indecent language. The courts have consistently held that greater limits may be imposed on expression aimed at

children than would be allowable for communication aimed at adults. F.C.C. v. Pacifica Foundation, 438 U.S. at 749; Ginsberg v. New York, 390 U.S. at 638-40. Here, Fraser's audience was primarily composed of minors. The school authorities had a substantial interest in protecting them from expression which could be shocking, embarrassing or detrimental at their stage of development. The school authorities were in the better position to determine whether the speech was harmful to other minors. Here, they concluded that Fraser's speech was disruptive and harmful. We should not lightly question that judgment.

Finally, schools perform a special function in our society. They are entrusted with the difficult task of educating children and preparing them for full participation in adult society. In addition to transmitting necessary

information and techniques of learning to the students, we expect schools to instill citizenship, discipline, and acceptable morals. In short, we expect schools to inculcate society's values and help children become fully adjusted adults. See Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Brennan, J. for the plurality); Diamond, supra at 498-99.

As the Supreme Court recently noted,

Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather they act in furtherance of publicly mandated educational and disciplinary policies.

New Jersey v. T.L.O., 105 S. Ct. at 741.

Given the special nature of the high school environment, school authorities have a right and a duty to condemn language that falls below the minimum standards of decency expected in the local community. "[W]hether a school condemns or tolerates indecent language

within its sphere of authority will have significance for the future of that school and of its students." Thomas v. Board of Education, 607 F.2d at 1057 (Newman, J., concurring).

In determining where school authorities may draw the line [regarding obscenity, vulgarity and indecency], courts must consider not only the fact that teen-age children are involved, but also the fact that the school is a special-purpose environment existing under peculiar sociological conditions It follows that a substantial degree of social propriety is called for in the operation of an effective educational system. It might even be said ... that discouragement of the use of obscene or profane language is a function of the school.

Haskell, supra at 56 (emphasis added).

In addition to the important function of schools in transmitting our culture's values, we must consider the tradition of judicial deference to the discretion of local school authorities in the management of school affairs. See generally, Board of Education v. Pico,

457 U.S. at 863-64; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42 (1973).

To the extent that schools are expected to transmit society's values, local school boards are in the better position to determine what these values are. See Diamond, supra at 509. Specifically, the community should have great leeway to define for itself the standards of decency expected in its schools. See Haskell, supra at 58.

School officials have wide latitude to balance free speech rights against the school's interest in avoiding endorsement of certain expression. Seyfried v. Walton, 668 F.2d 214, 216 (3rd Cir. 1981) (officials may censor school play). The assembly at which Fraser spoke was conducted during school hours, on school property, and students were required to attend the assembly or a study hall. As

a matter of state law, the "associated student body" election for which Fraser's campaign speech was given was a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district." Wash. Rev. Code Ann. § 28A.58.115. The school assembly, therefore, was a school district sponsored function that implied district endorsement of the students' activities.

The majority assumes that indecent language in a school can be prohibited only if it is legally obscene or likely to cause a "substantial disruption" under Tinker. Nothing in Tinker, however, "suggests that school regulation of indecent language must satisfy the criterion of a predictable disruption." Thomas v. Board of Education, 607 F.2d at 1055 (Newman, J., concurring). See also

Haskell, supra at 49. (Tinker inapplicable to obscene and profane speech.)

Tinker concerned regulation of pure political speech. The speech there, black arm bands to protest the Vietnam war, concerned a political matter towards which we expect our schools to remain neutral. In that context, the Court held that the school could only regulate this expression if it could predict "substantial disruption" of the educational environment. Tinker, 393 U.S. at 514.

This rationale is inapplicable to a school regulation which prescribes only the indecent manner in which an idea is expressed. Thomas v. Board of Education, 607 F.2d at 1055-57 (Newman, J., concurring). The Supreme Court has indicated on several occasions that government may regulate the time and place where ideas are expressed in an indecent or offensive manner. In Cohen v. California, 403 U.S.

15 (1971), the Court held that a state could not permissibly convict an adult simply for using a four-letter word. It indicated, however, that indecent speech could be prohibited in certain times and places. Id. at 19, 22.

The Court extended this rationale in F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), when it held that the FCC could limit the broadcast of offensive language to times when children would be unlikely to be exposed to it. Justice Stevens, writing for the plurality, noted that government had less authority to regulate "a point of view" than to regulate "the way in which it is expressed." Id. at 746 n.22. He stated:

A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. at 743 n.18.

The Pacifica plurality relied on a nuisance rationale to hold that the F.C.C. could regulate the time and context of offensive broadcasts. Id. at 750. It noted that indecent speech "'may be merely the right thing in the wrong place, -- like a pig in the parlor instead of the barnyard.'" Id. (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

Finally, the Court made a similar distinction between ideas and the manner in which they are expressed in Board of Education v. Pico, 457 U.S. at 871. In Pico, the Court held that whether a school district could remove books from its library depends upon the motivation involved. It stated, "[i]f petitioners intended ... to deny respondents access to ideas with which petitioners disagreed, and if this intent was the

decisive factor in petitioner's decision, then petitioners have exercised their discretion in violation of the Constitution." Id. The Court noted, however, that it would be constitutional to remove books because they were "pervasively vulgar" or they were not educationally suitable. Id.; see also id. at 880 (Blackmun, J., concurring).

If indecent language may be regulated anywhere, it surely may be regulated in the schools. I would hold that school authorities may prohibit indecent and vulgar speech regardless of whether it satisfies Tinker's "substantial disruption" standard.

Even if the Tinker standard applies, the majority errs in taking an overly constrained view of what constitutes "substantial disruption." This standard is flexible, Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973), and should be

viewed in light of the delicate environment necessary to sustain learning. Id. at 175. "[B]ecause of the state's interest in education, the level of disturbance to justify official intervention is relatively lower in a public school than it might be on a street corner." Id.; see Thomas v. Board of Education, 607 F.2d at 1053 n.18.

Courts should not be eager to substitute their judgment regarding what is disruptive for that of the school authorities. Substantial disruption to the educational environment may result from speech or conduct that appears harmless to the outside observer.

"[T]he proper functioning of the school is not, except at its gross extremes, an objectively ascertainable phenomenon." Diamond, supra at 497. A speech which causes great distraction, excitement or embarrassment among the

students may disrupt the educational process as greatly as one which results in fistfights.

The sensitive nature of the learning process calls for great deference by courts to the judgment of teachers and administration. "[I]n the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place." Id. at 486.

Here, the school authorities found that Fraser's speech greatly impeded the daily business of education. They produced testimony substantiating their claim that Fraser's speech was sexually harassing and demeaning to female students. They concluded that the speech was both disruptive and potentially harmful to the learning process. We

should not be quick to second-guess that judgment.

I disagree further with the majority's cursory affirmance of the district court's holding that Bethel High School's disruptive conduct rule is unconstitutionally vague and overbroad. School district rules are not held to the same due process standards for vagueness and overbreadth as criminal statutes. Black Coalition v. Portland School District No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973); Esteban v. Central Missouri State College, 415 F.2d 1077, 1087-89 (8th Cir. 1979), cert. denied, 398 U.S. 965 (1970).

Bethel High School's disruptive conduct rule was drafted specifically for the school environment. "Given this 'particular context,' the ordinance gives 'fair notice to those to whom [it] is directed.'" Grayned v. City of Rockford, 408 U.S. 104, 112 (1972).

Because school conduct rules cannot be drawn with the same precision as criminal statutes, some discretion must be left to school officials to decide what actions should be sanctioned. Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 442 (5th Cir. 1973).

As the Supreme Court recognized in New Jersey v. T.L.O., school disciplinary rules must be flexible to enable school officials to maintain an environment in which learning can take place.

[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. 'Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.' ... Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures

105 S. Ct. at 742-43 (citations omitted).

The discretion accorded school officials is limited when the school's disruptive conduct rule is used to infringe First Amendment rights. Hall v. Board of School Commissioners, 681 F.2d 965, 968 (5th Cir. 1982); Murray, 472 F.2d at 442. Here, however, Fraser's speech was not constitutionally protected. This court should defer to the school board's proper exercise of discretion.

Under the standards enunciated in Black Coalition, Bethel High School's disruptive conduct rule is neither vague nor overbroad. I would reverse the declaratory judgment and the award of attorney's fees and costs.



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a)	
minor, and E.L. FRASER,)	
as his Guardian Ad Litem,)	
	)	No. C83-306T
Plaintiff,)	
)	
-vs-	)	FINDINGS OF
	)	FACT AND
BETHEL SCHOOL DISTRICT	)	CONCLUSIONS OF
NO. 403, et al.,	)	LAW
)	
Defendants.)	
)	

The Plaintiff's application for Declaratory Judgment and an Injunction, having come on regularly for hearing and the Court then ordering that trial of the action on the merits be advanced and consolidated with the hearing of the application pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and the trial on the merits being then held on the 31st day of May, 1983, Plaintiff appearing in person and through his counsel, Jeffrey T. Haley, Defendants

appearing through its counsel, William A. Coats, and Clifford D. Foster; the Court having received and considered evidence, briefs, and argument of counsel, and being fully advised now makes the following:

FINDINGS OF FACT

1. Plaintiffs Matthew N. Fraser and E.L. Fraser are citizens of the United States and residents of Pierce County, State of Washington. Plaintiff Matthew N. Fraser is seventeen (17) years of age and is a senior enrolled at Bethel High School, and is the son of the other two Plaintiffs.

2. On April 26, 1983, Matthew N. Fraser (hereinafter referred to as Plaintiff) delivered a nominating speech on behalf of a candidate for student body vice-president at an all-school assembly. Approximately 600 students were in attendance. Students were required to

either attend the assembly or a study hall, but were not prevented from walking out of the assembly at any time.

3. The speech in question did not contain any patently offensive words.

4. The speech used certain words and phrases which could have had secondary meanings with connotations related to human sexual activity. These words and phrases were chosen for the purpose of developing a rapport with the students. The speech was designed to win the election for the Plaintiff's candidate.

5. On the day after the speech was delivered, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech.

6. After delivering the speech on April 26, 1983, Plaintiff was asked to

meet with school officials. He was told to produce a copy of the text of his speech and directed to report to Defendant Ingle's office the following morning during the first period of the next school day. He was warned that disciplinary action may result from his actions.

7. The 1982-83 Student Handbook of the Bethel Senior High School, Section 1, contains rules governing the conduct of students at Bethel High School. On page 8, the section entitled "District Offenses" provides, in relevant part:

In addition to the criminal acts defined above, the commission of, or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally these are acts which disrupt and interfere with the educational process.

. . .

Disruptive Conduct. Conduct which materially and substantially interferes with the

educational process is prohibited including the use of obscene, profane language or gestures.

8. On Wednesday, April 27, 1983, Plaintiff met with Defendant Ingle, Assistant Principal of Bethel High School. Defendant Ingle provided Plaintiff with copies of letters from five teachers regarding his speech. Three of the five letters expressed personal judgments that the speech was "inappropriate", "distasteful", "obscene", and contained "blatant sexual references". None of the letters suggested that the speech disrupted the assembly or caused other students to disrupt the assembly. Plaintiff was given an opportunity to explain the circumstances involved in giving the speech. He was then provided oral and written notice that he had violated the high school's rule concerning disruptive conduct and was told he

would be suspended for three days effective immediately, and that his name would be stricken from the ballot of candidates for graduation speaker, and therefore precluding Plaintiff from speaking at graduation.

9. The Plaintiff had previously been approved, by the school administration, to be a candidate on the ballot for graduation speakers shortly before he delivered the speech in question.

10. Plaintiff became a write-in candidate for graduation speaker and was elected as one of the commencement speakers.

11. The Plaintiff has never been disciplined by the Defendant for any matter, and had not previously been subjected to corrective action to modify his conduct.

12. Plaintiff initiated a grievance of this disciplinary action. By

agreement of counsel the matter was submitted to the School District's hearing officer based on the written agreements of counsel and the hearing officer's independent investigation of the facts. On May 19, 1983, Plaintiff's grievance was denied in a written decision by Defendant Alexander acting on behalf of Defendant Hosman.

FROM THE FOREGOING FINDINGS OF FACT
THE COURT MAKES THE FOLLOWING:
CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding under the First and Fourteenth Amendments to the United States Constitution, Title 42 U.S.C. § 1983, and Title 28 U.S.C. §§ 1343(3) and 2201.

2. Student speech is a form of expression entitled to at least some protection under the First and Fourteenth

Amendments to the United States Constitution.

3. The Plaintiff's speech was not obscene under the appropriate tests for obscenity.

4. The Defendant's disruptive conduct rule for Bethel High School is unconstitutionally vague, uncertain, and indefinite within the meaning of the due process clause of the Fourteenth Amendment, by failing to define and clarify what constitutes material and substantial disruption of the educational process.

5. The disruptive conduct rule in question is substantially overbroad in violation of the First and Fourteenth Amendments to the United States Constitution, because the rule is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

6. The imposition of a short term suspension, as defined in the Washington Administrative Code, Section 180-40-205(3), was in violation of the rule governing short term suspensions as set forth in the Washington Administrative Code, Section 180-40-245(2). See, Quinlan v. University Place School District, 34 Wash.App. 260 (1983).

7. The imposition of punishment in the form of removal of Plaintiff's name as a candidate for graduation speaker, violates his rights to due process of law under the Fourteenth Amendment of the United States Constitution, Title 42 U.S.C § 1983.

8. A declaratory judgment should issue invalidating the three-day suspension and removal of Plaintiff's name from the list of candidates for graduation speaker.

9. Injunctive relief should issue requiring Defendant to allow Plaintiff to speak at Bethel High School's commencement exercise on June 8, 1983.

10. The Court will not award damages, costs, or attorney's fees, unless and until the parties are unable to reach a settlement on these matters prior to July 25, 1983.

DATED this 8th day of June, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a)	
minor, and E.L. FRASER,)	
as his Guardian Ad Litem,)	
	)	No. C83-306
Plaintiff,)	
	)	ORAL OPINION
-vs-	)	OF THE HONOR-
	)	ABLE JACK E.
	)	TANNER
BETHEL SCHOOL DISTRICT)	
NO. 403, et al.,	)	May 31, 1985
)	
Defendants.)	
)	

THE COURT: I want to hear from the defendant as to the situation as the evidence stands under the guidelines of the Ginsburg Miller, the so-called Ginsburg Miller test. Are you familiar with those Mr. Coats.

MR. COATS: Yes.

THE COURT: All right, Take A, it says, whether the average adult applying contemporary community standards would find that the work taken as a whole appeals to the prurient interests of high

school students. So far all I have heard from are high school administrators or teachers, are they to be considered the average adult in the Bethel community school district. They are part of the charging parties here. Does this Court then consider their testimony as the average adult in the Bethel community school district.

What is your answer?

MR. COATS: I don't know how to get average adults, if you want me to call parents that would object to that speech, I have unlimited numbers.

THE COURT: We are now down to decision making. You said that you rested and I am asking, unless counsel wants to talk me out of it.

MR. HALEY: Your Honor, I have an expert on the subject on what is obscene in the community.

THE COURT: Do you want to open the subject.

MR. HALEY: I would like to make a complete record in the case, sir.

THE COURT: As far as I am concerned, you made it.

MR. HALEY: I agree, it is a very good record so far and they have called many of the same people that I expected to call myself.

THE COURT: I am asking the defendant, what in this record is the opinion of the average male, average adult, applying contemporary community standards in the Bethel School District.

MR. COATS: I would respond to your question like this, the rules in the handbook are approved by the Board of Directors of the Bethel School District, which are charged with adopting those rules. They are administered by the administrative staff of Bethel School

District. The parents of Bethel are well aware of that administration and I think this case is consistent with how they have been administered in the past. I think --

THE COURT: Has there ever been any case in the Bethel School District that these facts were applicable to.

MR. COATS: When you say the exact facts, I cannot respond to that.

THE COURT: You have rested your case and now I am looking at the guidelines that the Ninth Circuit and the Supreme Court says that this Court must judge as a matter of law. Not what I personally think or don't think, I have to apply these guidelines to reach a decision as to what is and what is not obscenity, because obviously, from all of the witness's testimony if the Court finds that it is not obscenity, you lose. That is what it is all about.

MR. COATS: I think our response is that there are different standards in a school assembly.

THE COURT: Yes, Ginsburg put that up.

MR. COATS: Ginsburg was a complete exclusion of a book that didn't involve the school set up.

THE COURT: All Ginsburg does is sort of balance the community interest with the student interest. If this was an adult in this case it wouldn't be so difficult, because we could go ahead and apply the Miller standards across the board, but I am supposed to modify the standards and it comes out some place between Ginsburg and Miller.

MR COATS: Mr. Foster will address that issue, he actually briefed it.

THE COURT: Yes.

MR. FOSTER: Your Honor, we are asserting that the Miller and Ginsburg

standards are not applicable to a school district rule limited simply to this premise within the school environment.

We are intending to show, I guess we put on our evidence, we think the cases demonstrate that we can use the common ordinary meaning of the word obscene for purposes of regulating Mr. Fraser's conduct, so we do not consider it a case of principles, that is punishing and proscribing distribution of literature to any minor in the State, the sale of material to people under 17 under that statute, therefore, we are considering that in the school environment a different standard of obscenity applies and certainly what is appropriate to be sold down on Pacific Avenue in a constitutional sense --

THE COURT: In reading from Washington State Administrative Code 180-40-215 it says, students rights, and

looking at subparagraph 2 it says, all students, not excluding Bethel High School, all students within the State of Washington, my addition, possess the constitutional right to freedom of speech.

MR. FOSTER: Yes, your Honor, and we believe that the constitutional right of freedom of speech as interpreted by the Federal Court does not include the right to engage in conduct and language that is offensive to other persons and we believe that our evidence as demonstrated that Mr. Fraser's speech meets precisely that challenge.

THE COURT: You paraphrase the law, you don't quite quote it, because the prong as modified for high school students is, the way I understand it, whether the average adult applying contemporary community standards would find that the work taken as a whole

appeals to the prurient interest of high school students.

I have heard nothing other than school administrators or principals from that community.

MR. FOSTER: Your Honor, I think that the people, the Board of Directors who were elected by the community in turn enforced the rules and actually write the rules for the high school level, I do think that they are indicative of the community and they are an adequate expression of those elected officials --

THE COURT: That is your position, all right.

B, whether the work depicts or describes in a manner that is patently offensive to adults when considered for presentation to high school students sexual conduct specifically defined by the applicable law or rules. Where do I

look to the applicable law or rules that define that specific sexual conduct.

MR. FOSTER: Once again, we are relying on the prohibition of the obscene language and disruptive conduct rule, your Honor.

THE COURT: All right.

MR. FOSTER: Once again though our basic position is that this is not the appropriate test for the school environment, we are not dealing with total suppression of material on the basis of obscenity to minors under a certain age, the situation we deal with in Ginsburg.

THE COURT: C, whether the work taken as a whole lacks serious literary artistic political or scientific value for high school students. It was delivered in a political context, wasn't it?

MR. FOSTER: It was delivered in a context, we believe, Mr. Fraser could

have made the point that his candidate was a man of endeavor or whatever he wanted to make the point without using the sexual innuendo.

THE COURT: What you say by that is that if he didn't conform to what was appropriate in the administration's view, that is what you are saying.

MR. FOSTER: We think that the administration was constitutionally asking in a permissible manner to restrict the presentation of his ideas in a non obscene --

THE COURT: So what we are getting down to is this word appropriate as being a prohibited as opposed to inappropriate, being disruptive, isn't that a subjective-type thing.

MR. FOSTER: Your Honor, everything --

THE COURT: Like beauty is in the eyes of the beholder.

MR. FOSTER: What we have here is--

THE COURT: Because the words themselves here are not obscenity.

MR. FOSTER: But the meaning conveys was one of a latent sexual nature.

THE COURT: That is subject to interpretation.

MR. FOSTER: Language is subject to interpretation, your Honor.

THE COURT: Then we are down to freedom of speech under the First Amendment.

MR. FOSTER: Within the context of the school environment we do submit that the specialty calling for --

THE COURT: But that special case does not deprive Mr. Fraser or any other similarly situated from his constitutional rights as a citizen of the United States.

MR. FOSTER: We have no contention on that, your Honor.

THE COURT: All right, all you are saying is you can't use obscenity, so if it is not obscene, you lose and if it is obscene you win.

MR. FOSTER: No, that is not quite correct.

THE COURT: Well, what is it then?

MR. FOSTER: We feel that the disruptive conduct rule cannot draw an absolute distinction between speech and conduct. Conduct is a much broader term. Certainly, if somebody challenges another person to a fight that is conduct --

THE COURT: That is what I asked you, isn't that rule in itself ambiguous and uncertain?

MR. FOSTER: Not as applied to a high school student, I think Matt Fraser knew perfectly well what was expected of him during this assembly --

THE COURT: A high school student is supposed to know what the administrators

put down in the rules and adults aren't, how do you think we operate our criminal statutes.

MR. FOSTER: I think the criminal statutes are inapplicable to high school environment and I think in our cases cited in our brief demonstrate that. We are dealing with a different situation.

THE COURT: But he is entitled to specifically to know what he is prohibited from doing and he is specifically entitled, how did I break the rule, and he is specifically entitled to what the punishment is. They don't take that away from him.

MR. FOSTER: No, but what we have in the rule is a definition of punishment up to and including suspension and expulsion. The definition of additional punishment, if you will, under the Washington Administrative Code is simply, well, any other disciplinary action other

than the suspension or expulsion up to and including, once again, one is traditional and we believe forewarned aspects of discipline is the removal of the privilege to participate --

THE COURT: Okay, would you agree that the rule that Mr. Fraser is accused of violating does not specifically design any prohibited sexual conduct nor does it refer to any definition of sexual conduct.

MR. FOSTER: Your Honor, it has no definition of sexual conduct in the manner of the issue we have in Ginsburg. We will freely admit that.

THE COURT: All right. The question of punishment, what section of the WAC's are you depending on.

MR. FOSTER: Discipline is defined, there are three separate sections in the code.

THE COURT: In the short term.

MR. FOSTER: Short term suspension is defined separately, but in WAC 180-40-205, subsection 1, discipline is defined as all forms of corrective action or punishment other than suspension and expulsion and shall exclude the exclusion of a student from a class by a teacher or an administrator for a period of time not exceeding the balance of the immediate class period. Discipline shall also mean the exclusion of a student from any other type of activities conducted by or in behalf of the school district. It is a broad inclusive definition to which short term suspension, long term suspension and expulsion are set out as differing --

THE COURT: How do the students know the prohibited conduct what the suspension is, isn't everybody entitled to know the punishment?

MR. FOSTER: I think it is clear, first of all, we are dealing once again

with this school district setting and school officials have very broad authority screened only by the code provisions and the overriding concerns of the First Amendment and due process to regulate their behavior. What we are dealing with is that in the educational process discretion is a part of life, it is a part of teaching and the second thing is creating discipline is designed to further the purpose of the school district.

THE COURT: Do you think that we have a head-on collision of the plaintiff's rights under the First Amendment and the school administrator's right to administer?

MR. FOSTER: I think that is true and I think in that conflict, your Honor, the Federal Court has recognized the necessity for the definite balancing of those First Amendment concerns with the

compelling state interests and I believe that is how it is specifically defined in cases that the particular court relied upon to respect that system. Judicial intervention has to be delicate and guarded and can only occur when we have basic constitutional value implicated by a school district --

THE COURT: What constitutional value was in the Quinlan case and the appellate court reversed that case.

MR. FOSTER: It was not a constitutional case, your Honor.

THE COURT: That is what I am saying, but we have a constitutional problem involved here.

MR. FOSTER: That is absolutely right, your Honor, this is before you on a section 1983 action by the plaintiff alleging that we have deprived Mr. Fraser of his constitutional rights. It does not appear on the state court basis --

THE COURT: Washington State Constitution and the First Amendment rights are the same thing, freedom of speech.

MR. FOSTER: I agree.

THE COURT: Tell me again, why did they reverse Quinlan.

MR. FOSTER: Quinlan involved whether it was appropriate for a school district to have a rule that said if you are caught drinking at a school dance you are automatically suspended for the rest of the semester, a long term suspension. The court rules that these WAC regulations and the statutes that authorizes those did not allow a school district to impose a predetermined penalty against the student, because they didn't use any judgment, they said you violated the rule, you are out for the rest of the semester.

THE COURT: I think you should read that case again. She wasn't charged with drinking at school.

MR. FOSTER: At a school activity, a school dance.

THE COURT: No, she wasn't, she was charged with drinking and being there. There was no charge that she drank at the school.

MR. FOSTER: That is correct, but this turns on the propriety of that rule as applied in a situation where a long term suspension is involved.

THE COURT: She had a spotless record with no discipline. The same way other than you might not be a conformist, or as one witness said, he is different, the same factual situation as to Mr. Fraser.

MR. FOSTER: I don't think these rules provide one free bite though.

THE COURT: Pardon?

MR. FOSTER: I don't think these rules provide one free bite.

THE COURT: It does, there is no prospective application to this, the speech was made.

MR. FOSTER: The point though, your Honor, is what we are determining ultimately is the constitutional right here and we feel that the constitutional right of free expression is one, to protect ideas and the flow of ideas from our society and I don't think that Mr. Fraser has demonstrated or can demonstrate that he is engaged in the constitutionally protected area of disseminating ideas of a political nature. We might call this a political speech because it was a high school assembly --

THE COURT: Do we look at the successful political campaign, the client won.

MR. FOSTER: We are judging there the effectiveness of this particular form of action, but what idea are we protecting here if we consider this sexually suggestive language to be constitutionally protected. Couldn't he have expressed his idea in a manner --

THE COURT: I am asking, counsel, is it disruptive just because I disagree with you or I would have done it differently, isn't that what the First Amendment is all about.

MR. FOSTER: I think the form of Tinker is, your Honor, is that there is those Viet Nam cases that says the final, non disruptive form of protest against the councils in Viet Nam, such as wearing of arm bands was not prohibited by the First Amendment, but the exception reads more loudly than the rule, if a school official can forecast it where --

THE COURT: We haven't got forecast here.

MR. FOSTER: Yes, we do, your Honor.

THE COURT: Where?

MR. FOSTER: We have a forecast and I think Mrs. Stewart's testimony indicates that if we allow students to get up and engage in sexually suggestive types of language that we can have a reasonable basis for predicting that this educational process will be disrupted.

THE COURT: How about the situation that the young ladies can wear, as one judge said, such sexually suggestive clothing.

MR. FOSTER: If the young ladies wear sexually suggestive clothing I suppose if we have a reasonable basis and we can demonstrate a reasonable basis for predicting that Tinker is permissible to regulate speech on the basis of a predictable disruption of the educational --

THE COURT: Why do you think that the Seattle Sea Girls, the Dallas cheerleaders and the Bethel School District wear certain costumes on cheerleaders, not to call their attention to them?

MR. FOSTER: Mostly why the cheerleaders wear the costumes that they do --

THE COURT: Because we want to look at them, obviously. It has nothing to do with the football game.

MR. FOSTER: You started this case, your Honor, by talking about what is appropriate and we are saying that we have a pig in the parlor here and I can say a speech was inappropriate and disruptive at a high school assembly --

THE COURT: My problem here is I cannot decide this case on what I personally think, I have to apply those guidelines, no matter what I think. I understand that administrators must run the schools, but I have here a claim of

protection of the First Amendment, which I do not take lightly.

MR. FOSTER: Correct, we feel, and we have cited you cases and I think the Thompson before the Board of Education case in New York --

THE COURT: Each one of them has to be decided on its facts.

MR. FOSTER: They also have to be decided under the appropriate analytical standards that we feel that school districts are entitled to, one, special consideration in the manner in which they draft their rule and the vagueness overbreath-types standards are unique to school districts and two, if here a school district can regulate non obscene in a constitutional sense it is certainly indecent --

THE COURT: I know nothing in any of the cases that you said that that rule

can be over broad or uncertain. It must be clarity.

MR. FOSTER: The rule as to the over broad --

THE COURT: There must be some way that someone other than school administrators can interpret it fairly.

MR. FOSTER: Well, we have cases where standards such as incorrigible, disruptive, in the words they are not in the best --

THE COURT: Here we have a case where the teacher said I invited him to talk to me about it. That is like turning on a spigot and she had trouble turning it off, because he didn't want to talk about it the next day in the Home Economics class.

MR. FOSTER: That is right, but the impact of the speech is reasonably predictable and if we let people get up and engage in sexually suggestive

features we are going to have a disruption in the educational process at the school district far above and beyond --

THE COURT: I would imagine in the Bethel community 20 years ago, if it was there at that time, it would have been one thing. When I went to school it wasn't even there, it was just woods, but things change in the community. What was permissive now was unheard of before and that is what the First Amendment is about.

MR. FOSTER: It was permissive to the administrators who were acting on behalf of that elected Board of Directors prohibiting indecencies. We feel his constitutional --

THE COURT: I think if there is a conflict between the authority to the school board and Mr. Fraser's constitutional rights to freedom of speech he has got to win, because if I understand the

interpretation it has to be the least intrusive, at least the regulation upon his rights under the First Amendment.

MR. FOSTER: I want to cite a case though that deals of a village's attempt to solve a problem of fraud. That is dealing once again with complete state suppression of an activity and not limited --

THE COURT: I look at plaintiff's brief the same way as I look at the defendant's. Lawyers get paid to be prolific, cut down trees, that makes newspaper and you write on it. It is probably a tragedy to the taxpayers and the people of the Bethel School District that this case is even here, but I guess it has become embedded in concrete now and people have taken up sides.

MR. FOSTER: I think in closing you have to recognize the unique environment of the school. We are not dealing with

complete suppression of freedom of speech

--

THE COURT: I know, but the Washington State Legislature meant something when they say they have some rights, frankly I was surprised, but they do and after you modify the rights that you have, I am saying you as an adult, against those of high school students, what is it. You just can't abrogate all the rights by saying, regardless of what they are, the school board in their need to administer and have conduct, discipline that meets the appropriate standards of the school district may run into each other someplace along the line.

MR. FOSTER: But the point is that we feel that we are acting on constitutionally permissible ground, therefore, the incorporation of these standards to be there, regardless of what the legislature says.

THE COURT: I just do not see it and I think it is your burden to show the obscenity. I do not believe that the speech was obscene under the guidelines as I see them.

MR. FOSTER: Under the Ginsburg Miller?

THE COURT: Yes, under the Ginsburg-Miller and if they are not obscene under that then there is no violation, even if taking at the most liberal interpretation and I frankly do not understand the rule that provides the rule in question here, the one that starts out, disruptive conduct, the one that is in issue here, frankly I think it is over broad and uncertain and obviously the punishment is vague and uncertain, indefinite.

MR. HALEY: Your Honor, I think you are absolutely correct that you have to apply the law that has been announced by

the U.S. Supreme Court and the Circuit Courts appeals. I suspect, however, that the school district may argue that there is a new section that hasn't yet been recognized by the U.S. Supreme Court.

THE COURT: That is always an argument.

MR. HALEY: In preparation for that I would like to offer two facts in evidence, if counsel will stipulate to these facts, first, this was a student activity run by students and second, the --

THE COURT: That is in the pleadings. There was a student in charge of it. It is undenied.

MR. HALEY: Because it has been denied --

THE COURT: It hasn't been denied. There was a student in charge of it.

MR. COATS: There was a student in charge of the assembly, I will agree to

that, but we have over all responsibility for it.

THE COURT: I understand that.

MR. HALEY: The other fact is that student government activities are not funded by tax dollars.

THE COURT: What has that got to do with freedom of speech?

MR. HALEY: I expect that it may be a fact that will be used to argue one way or the other on this.

MR. COATS: I don't agree with the last statement of counsel.

THE COURT: I understand. Now, the question is since we are this far and the cost must be exorbitant to the Bethel School District people that will resolve anything, nothing, obviously. It will just polarize the situation between some of the students and teachers and the administration. It is a terrible situation and this Court is going to be caught

in the middle of it, no matter how I come out, it is going to be my fault, so I guess that is what I am here for.

I will sign this declaratory judgment setting aside the finding of disruptive, however it is going to be worded, conduct to that speech, which I found is not obscene.

The question now becomes, what is the situation on the student body's vote that Mr. Fraser was the second of three candidates to be the speaker.

MR. HALEY: Your Honor, Mr. Fraser has agreed that he will give a speech at graduation that is appropriate for a graduation speech and the students who are the members of the graduation committee all were in favor of leaving him on the ballot because they believe in fact that he would give an appropriate speech.

THE COURT: Counsel, isn't the problem the one that faced Adam Clayton

Powell in New York and faced the Congress of the United States, his constituents have voted him to that spot, can now the administration at this time remove him, doesn't he belong to them for good or for worse, or for bad.

MR. FOSTER: We admit that the school district --

THE COURT: Do they have the power to censor.

MR. FOSTER: I think they have the power to run their graduation ceremony in a manner they deem appropriate.

THE COURT: That is exactly what I'm talking about, hasn't the Supreme Court of the United States referred to that as censorship.

MR. FOSTER: Your Honor, in the Ninth Circuit in the cases recognized that some, ordinarily --

THE COURT: That some?

MR. FOSTER: That some censorship, if you will, is appropriate in high school.

THE COURT: Here we have now a student who stands absolved of anything and no previous discipline, what disqualifies him.

MR. FOSTER: I think, if you will, it is a preventative measure. Mr. Fraser has demonstrated once that what he thinks is appropriate for a speech in front of the assembly isn't what obviously the school officials feel --

THE COURT: Why don't you have him arrested then if he does something wrong.

MR. FOSTER: I suppose we could always pull off the stage, your Honor.

THE COURT: With a hook, with a gong. Somebody might get a nervous trigger finger.

MR. FOSTER: I guess the question is that if the Court is going to award him

the release that he has to be a speaker I suppose that we will have no choice, but in that event we would obviously want to move for a stay in that judgment.

THE COURT: He has a right to be made whole, put right back where he was. This is obvious that it was a second thought, the punishment, that took him off the list in the first place. It probably would have been better if the students would have said, no, then we probably wouldn't be here.

MR. FOSTER: Perhaps not, but I think you will find the declaratory relief and the injunction concerning the graduation ceremony at Beth High School intact.

THE COURT: It is just repugnant to me to be involved in this situation. I do not relish this type of situation and I didn't ask for the case. So what do you want to do, do you want to settle the

case among yourselves? I think you would be better off. I know, lawyers make records and people of the Bethel School District will pay for it and you will go to the Ninth Circuit and you will either win or lose and I am suggesting that you are going to lose however you come out, the people of that school district will lose and the lawyers are going to say, boy, I sure showed them, showed them what.

I have decided that the plaintiff is entitled to be a speaker. I do not want to enjoin the Bethel School District from doing anything, their job is tough enough, I understand that. I hope the parties will resolve this matter and I won't have to.

MR. COATS: Assuming we don't settle it and we do want to proceed, could we have an understanding as to time as time is very important.

THE COURT: I am sure that you will both submit findings of fact and conclusions of law.

MR. COATS: Could we have, if they are willing to do that, at no later than Friday, because graduation is next Thursday.

THE COURT: If you do not agree, if the parties do not agree to these terms I will sign such an order, however it is worded, providing Mr. Fraser be a commencement speaker at his graduation class. When is it, next Thursday?

MR. COATS: Wednesday, excuse me.

THE COURT: It will be signed no later than Tuesday. Hopefully, I won't have to enter such an order.

MR. COATS: There is no way to get that time shortened, there is nothing I can do and if it is signed on Friday at least we have that option. I have not said that we would appeal.

THE COURT: Counsel, neither you or plaintiff, at least you haven't suggested any findings of fact or conclusions of law, how will the appellate court know what I did, they have to have something to look at.

MR. COATS: You said you would sign no later than Tuesday.

THE COURT: No later than Tuesday. I found the closer the deadline the more people seem to pull together and say let's resolve something.

MR. COATS: I am just suggesting that could we have that order be signed no later than Friday. Obviously, I don't have findings and conclusions and if the order is going to be entered that it be entered at least this week so we have that choice to review it.

THE COURT: I personally have a problem that I can't sign it Friday and

no other judge since they haven't heard it can sign it.

MR. COATS: I agree with that.

THE COURT: Get them here and they will be signed no later than Tuesday.

MR. COATS: Judge, I assume that you would not consider a motion for a stay of your order?

THE COURT: I wouldn't make it. The way I understand it it is the same thing, it is a sex or a race or a religious discrimination case, the employer says, we already filled that job and here you would come in and say, we have had that commencement exercise and he is entitled to be made whole and the remedy must take care of that.

MR. HALEY: Your Honor, the only thing that remains then is damages and costs.

THE COURT: We can take those later. I am hoping that you resolve the whole thing.

June the 24th.

July 26th.

MR. COATS: That will be fine with me.

THE COURT: Hopefully, I think that the people of Bethel School District, regardless of who is the principal, regardless of who is the superintendent now everyone would be better off, I think. No one ever wins in these cases.

All right, thank you.

You must have your findings of fact and conclusions of law in by Friday.

(Court at recess)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a)	
minor, and E.L. FRASER,)	
as his Guardian Ad Litem,)	
	)	No. C83-306T
Plaintiff,)	
)	
-vs-	)	INJUNCTION AND
	)	DECLARATORY
BETHEL SCHOOL DISTRICT	)	JUDGMENT
NO. 403, et al.,)	
)	
Defendants.)	
)	

THIS MATTER having come on regularly before the above-entitled Court, and the Court having entered Findings of Fact and Conclusions of Law in this matter, it is now:

ORDERED that Defendants violated Plaintiff Matthew N. Fraser's rights under the First and Fourteenth Amendments of the United States Constitution and Title 42 U.S.C. § 1983, by subjecting him to a three-day suspension and removal of his name from the list of candidates for

graduation speaker at Bethel High School,
it is further

ORDERED that any and all punishment
imposed upon the Plaintiff, Matthew N.
Fraser, in this matter, is hereby set
aside and declared null and void. It is
further

ORDERED that Defendant Bethel School
District No. 303, its officers, agents,
representatives, employees, attorneys,
and all persons in active concert and
participation with them, and each and
everyone of the named defendants, be and
they are hereby permanently enjoined and
restrained from, in any manner, refusing
to allow Plaintiff Matthew N. Fraser from
participating in the Bethel High School's

commencement exercises as a graduation speaker on June 8, 1983.

DATED at Tacoma, Washington, this 8th Day of June, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MATTHEW N. FRASER, a)	
minor, and E.L. FRASER,)	
as his Guardian Ad Litem,)	
	)	No. C83-306
Plaintiff,)	
)	
v.	)	JUDGMENT
)	
BETHEL SCHOOL DISTRICT)	
NO. 403, et al,)	
)	
Defendants.)	
)	

This action came on for hearing before the court, Honorable Jack Tanner, District Judge, presiding and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Matthew Fraser, recover of the defendants, Bethel School District No. 403, et al., \$278 as damages and \$12,750 as costs and reasonable attorneys fees, with interest thereon at the rate provided by law.

Ordered and Approved as to form this
31st day of August, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Entered at Tacoma, Washington this
____ day of August, 1983.

CLERK OF THE COURT

Presented by:

/s/ Jeffrey T. Haley
JEFFERY T. HALEY,
Attorney for Plaintiffs

Approved as to form;
Notice of presentation
waived.

/s/ William A. Coats
WILLIAM A. COATS,
Attorney for Defendants

RCW 28A.58.115 Associated student bodies--Powers and responsibilities affecting. As used in this section, an "associated student body" means the formal organization of the students of a school formed with the approval of and regulation by the board of directors of the school district in conformity to the rules and regulations promulgated by the superintendent of public instruction: Provided, That the board of directors of a school district may act or delegate the authority to an employee of the district to act as the associated student body for any school plant facility within the district containing no grade higher than the sixth grade.

The superintendent of public instruction, after consultation with appropriate school organizations and students, shall promulgate rules and regulations to designate the powers and

responsibilities of the boards of directors of the school districts of the state of Washington in developing efficient administration, management, and control of moneys, records, and reports of the associated student bodies organized in the public schools of the state. [1984 c 98 § 1; 1975 1st ex.s. c 284 § 3; 1973 c 52 § 1.]

Severability--1975 1st ex.s c 284:

See note following RCW 28A.58.113.



NO. 84-1667

Office - Supreme Court, U.S.

FILED

JUL 12 1985

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

Bethel School District No. 403;
Christy B. Ingle; David C. Rich;
J. Bruce Alexander; and
Gerald E. Hosman,

Petitioners,

v.

Matthew N. Fraser, a Minor,
and E.L. Fraser, as his
Guardian Ad Litem,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief of Matthew N. Fraser, Respondent
Response to Petition for Certiorari

Simburg, Ketter, Haley,
Sheppard & Purdy
2525 First Interstate Center
Seattle, WA 98104
Telephone: (206) 382-2600

By: Jeffrey T. Haley
Counsel of Record

CBED Legal Printers, Seattle, Washington

BEST AVAILABLE COPY

INDEX

I.	QUESTIONS PRESENTED	1
	A. Main Question	1
	B. Subsidiary Questions	1
II.	RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE	3
III.	ARGUMENT	10
	A. The result below is based upon seven reasons.	10
	B. The decisions below are not inconsistent with any published opinion of any federal court.	11
	C. The precedential value of the pub- lished opinion below is very narrow.	12
	D. On the central issue, the opinion below is clearly correct.	14
IV.	CONCLUSION	18



I. QUESTIONS PRESENTED

A. Main Question:

Based on the facts found by the district court and other evidence in the record, did the Ninth Circuit correctly conclude that there is a basis for affirming the result in the district court?

B. Subsidiary Questions:

(1) Is Fraser's speech protected by the First Amendment?

(2) Is the School District's Disruptive Conduct Rule unconstitutional on its face under the First Amendment?

(3) Did prohibiting Fraser from speaking at graduation as a form of punishment violate Fraser's rights to due process?

(4) Did the imposition of a short term suspension by the defendants violate state regulations and did the district court have authority to decide this issue?

(5) Is the School District's Disruptive Conduct Rule unconstitutionally vague, violating rights of due process?

(6) Did prohibiting Fraser from speaking at graduation as a form of punishment violate Fraser's rights under the First Amendment?

(7) Did punishing Fraser for giving a speech that was previewed by three teachers who did not direct him to refrain from giving it and did not suggest its delivery might violate school rules, even though they are charged with enforcement of school rules, violate Fraser's right to due process?

II. RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE

To supplement the facts as stated by the Petitioners, the Respondents call the Court's attention to the following facts.

Fraser privately presented his speech to three different teachers, seeking their comments, before delivering his speech to the assembled students.

Complaint and Answer, ¶10 (Excerpt).

None of the three either (1) directed Fraser to refrain from giving the speech, (2) suggested that it's delivery might violate school rules, or (3) alerted the administration that Fraser intended to give an improper speech. RT at 32, 51, 52, 68. Teachers at the school are requested to enforce school rules, RT at 34, and requested to take action to avert violations of school rules, RT at 108.

Approximately one year earlier, another student published an essay in the school's literary magazine which, through sexual double meanings, described in detail the sexual conquest of a female by a male, including sexual intercourse. A copy of this essay is attached to the Complaint as Exhibit A (Excerpt tab 1). This student was not suspended for publishing the essay and was a speaker at graduation. Complaint and Answer ¶22 (Excerpt).

At a similar political nominating assembly one year earlier, a student delivered a speech which contained a sexual innuendo and "four letter words". The student was only verbally reprimanded and was not suspended. RT at 52; Answer ¶23.

Because the student who gave a nominating speech with sexual innuendo and "four letter words" the year before was not punished, Fraser believed that the delivery of his speech would not subject him to discipline. RT at 52. A teacher who previewed Fraser's speech was not aware that there was a school rule regarding speeches of this sort. RT at 32. The school's assistant principal testified that school authorities do not expect lay people to know what constitutes disruptive behavior under the rule. RT at 93.

The assembly at which the speech was given was conducted by students for the purpose of presenting speeches for the election of student officials. Answer, ¶13; RT at 52, 132. The students were not required to attend the assembly and

were free to walk out at any time.

Findings ¶2 at 2 (Excerpt tab 7); RT at 38.

In Fraser's speech, the words and phrases which have sexual secondary meanings were chosen for the purpose of developing a rapport with the students to win the election for Fraser's candidate. Findings ¶4 at 2 (Excerpt tab 7); RT at 47. The primary meanings of these words and phrases were chosen as metaphors to describe the political attributes of Fraser's candidate. RT at 48.

The student response to Fraser's speech was a mixture of strong approval, (clapping, hoots, hollering, "wonderful," "we are all for it," "great,") and quiet expression of non-understanding. RT at 28, 29. There is no evidence in the record that any students were offended by

the speech, were sexually excited by the speech, disapproved of it, or found it obscene.

After he delivered the speech, Fraser was warned that disciplinary action might result from his speech. Findings, ¶6. During the first class period the following morning, a school official informed him that the speech had a sexual meaning, that it was therefore obscene, and that this obscenity constituted a violation of the school's disruptive conduct rule. RT at 74-77. The official also presented letters from five teachers regarding the speech which constituted the basis for the charge. Three of the five letters were critical of the speech's content, expressing personal judgments that the speech was "inappropriate," "distasteful,"

"obscene," and contained "blatant sexual references." None of the letters suggested that the speech disrupted the assembly or caused other students to disrupt the assembly. Findings ¶8 at 3.

Before a student can appear on the ballot given to seniors to elect graduation speakers, the student must be approved by a panel of teachers and administrators. RT at 30, 59. The school administration gave particular scrutiny to Fraser's suitability as a graduation speaker, RT at 60, 61, 103, 104, and approved him as a speaker about three hours before Fraser gave the political speech to which school authorities objected. Findings ¶9 at 3 (Excerpt). Although his name was removed from the ballot for graduation speakers, Fraser won the election by write-in votes. RT at 80.

After Fraser was charged and punishment was imposed, a teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech. Findings, ¶5 (Excerpt tab 7). Before the Ninth Circuit, the Petitioners characterized this incident as a disruption of the educational process, Appellants' Br. at 4, which justifies the punishment previously imposed, Appellants' Br. at 20.

Applying the doctrine of *Miller* and *Ginsberg*, the trial court found that the speech was not obscene under the relevant community standards for high school students. RT at 114, 117, 118, 131; Findings of Fact and Conclusions of Law, ¶3 at 4.

III. ARGUMENT

This case does not merit review by the United States Supreme Court for the following reasons.

A. ~~The result below is based upon seven reasons.~~

The Court must affirm the decisions below if the result is correct, even if the courts below relied on a wrong ground or gave a wrong reason.

The Ninth Circuit relied upon two separate grounds for affirming the result which are stated in Subsidiary Questions 1 and 2. In addition to these two grounds, the District Court also cited two additional grounds for reaching the result below. These are stated in Subsidiary Questions 3 and 4. One of them is based upon state law.

In addition to these four grounds, there are three additional grounds for affirming the result below which are stated in subsidiary questions 5, 6, and 7. If the Court is to overturn the result below, it must consider and overrule the four grounds relied upon by lower courts. In addition, it must consider the three additional grounds which were not ruled upon below and decide them against the respondent.

B. The decisions below are not inconsistent with any published opinion of any federal court.

The central issue of the decisions below concerns the power of school officials to punish high school students who use sexual innuendo, without obscenity or offensive words, in speeches concerning student politics. Neither the

petitioners nor the dissenting judge in the Ninth Circuit have cited any cases from any federal court which differs from the Ninth Circuit's decision on this issue.

C. The precedential value of the published opinion below is very narrow.

The Ninth Circuit opinion decided three issues. Petition, A-9-10. The first issue was whether the speech caused a material disruption to the educational process. Based on the facts of the case, the Ninth Circuit concluded that it did not. Petition A - 21. This conclusion was based upon the facts and has little precedential importance.

The second issue was whether the Ninth Circuit should recognize a new exception to the First Amendment for the use of non-obscene sexual innuendo in

schools by high school students. The Petitioners urged that this exception should be based upon an extension of **Federal Communications Commission v. Pacifica Foundation**, 438 U.S. 726 (1978). Petition A - 24. Considering that the speech in question was a political speech, the Ninth Circuit declined the invitation to create new law in this case. Petition A - 30, A - 32. Although this opinion will require district courts within the Ninth Circuit to protect the use of non-obscene sexual innuendo without offensive words in political speeches by high school students, it is not binding upon the rest of the district courts or the Courts of Appeals. Within the Ninth Circuit, the precedential value will be very narrow because it will only apply to non-obscene

political speeches without offensive words.

The third issue decided by the Ninth Circuit is whether the forum for the speech was a school function which allows the school to regulate the content of speeches presented. Based upon the facts of the case, the Ninth Circuit concluded that the assembly was clearly an extra-curricular activity and not part of the school curriculum. Petition A - 38. Again, the precedential value of this conclusion is limited to cases involving high school student politics.

D. On the central issue, the opinion below is clearly correct.

The central issue in this case is whether school officials can prohibit speech by high school students at student run political assemblies which uses

sexual innuendo but which is not obscene and does not use any offensive language. The district court and the Ninth Circuit have ruled that they cannot. As stated by the Ninth Circuit, the opposite answer would be fraught with grave danger because it is impossible to articulate clear standards for distinguishing such speech which is protected by the First Amendment from speech which is not. Petition A - 30.

The petitioners argue that school officials should be permitted to prohibit in the schools any form or style of speech that they deem inappropriate, as long as they are not actually motivated by a desire to suppress the expression of ideas. Petition at 19. Such an approach would turn existing principles of First Amendment doctrine on their heads. The

form and style selected by a speaker are frequently essential ingredients of the message to be communicated.

In the case before the court, the sexual innuendo used by Fraser was an essential ingredient in his message. The common ground of student politics is that the administration is the adversary. Fraser wished to demonstrate to the students that, like his candidate, he had the political guts to stand up before the administration and deliver a speech which the students would find witty but the administration would find inappropriate. The evidence suggests that the message was successful because Fraser's candidate won the election.

School authorities do not need the power to punish students for using sexual innuendo in student politics. The

mission of our schools is to educate rather than to control. If a local community views the use of sexual innuendo as distasteful or inappropriate in certain situations, school authorities can teach the students this view. Arguably, school authorities have a duty to teach about such views of the community.

However, school authorities should not coerce students to follow to this view. The school experience should teach principles of the First Amendment by example. Students should be taught that speech which is disapproved of by the community may cause social, political, or business repercussions. If the authorities do their job, the students will learn that there are reasons to use acceptable forms of speech, other than

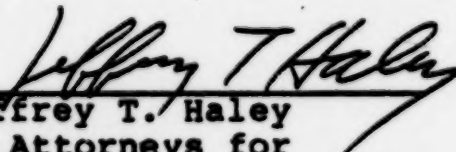
avoiding punishment by school authorities. But, as in our society outside schools, students must be free to use all forms of expression protected by the First Amendment without fear of punishment by governing authorities.

IV. CONCLUSION

The Court should deny the Petition for Certiorari and allow the decision of the Ninth Circuit to stand without review.

Respectfully submitted,

SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY


Jeffrey T. Haley
of Attorneys for
Respondents

NOV 27 1985

JOSEPH F. SPANIOLO, JR.
CLERK

No. 84-1667

In The
Supreme Court of the United States

October Term, 1984

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B.
INGLE; DAVID C. RICH; J. BRUCE ALEXANDER;
AND GERALD E. HOSMAN,

Petitioners,

vs.

MATTHEW N. FRASER, A MINOR, AND E. L.
FRASER, AS HIS GUARDIAN AD LITEM,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOINT APPENDIX

KANE, VANDEBERG,
HARTINGER & WALKER

First Interstate Plaza, Suite 2000
Tacoma, WA 98402-4391
(206) 383-3791

By: William A. Coats
Counsel of Record

And Clifford D. Foster, Jr.

Counsel for Petitioners

SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY

2525 First Interstate Center
Seattle, WA 98104
(206) 382-2600

By: Jeffrey T. Haley
Counsel of Record

Counsel for Respondents

**Petition for Writ of Certiorari filed April 19, 1985
Certiorari granted October 7, 1985**

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

1088

TABLE OF CONTENTS

	Page
DOCKET ENTRIES	1
COMPLAINT OF PLAINTIFFS	2
ANSWER OF DEFENDANTS	20
EXCERPT FROM REPORTER'S TRANSCRIPT	26
PLAINTIFF'S EXHIBIT #1 (5 letters concerning Fraser's speech)	94
PLAINTIFF'S EXHIBIT #2 (decision of school dis- trict hearing officer)	100

INDEX TO RECORD

<u>REPRODUCED MATERIAL</u>	<u>CLERK'S DOCKET NUMBER AND DATE</u>
COMPLAINT (2)	NR 1, May 23, 1983
ANSWER (20)	NR 5, May 27, 1983
REPORTER'S TRANSCRIPT (26)	NR 15, Sept. 6, 1983
PLAINTIFF'S EXHIBIT #1 (94)	NR 4, May 27, 1983
PLAINTIFF'S EXHIBIT #2 (100)	NR 4, May 27, 1983

DOCKET ENTRIES

<u>DATE</u>	<u>NR</u>	<u>FRASER vs. BETHEL PROCEEDINGS</u>
1983		
May 23	1	Complaint Iss Summ
May 23	2	Notice Of Hearing On Tro & Merits . . . 5-31-83 at 8:30 am Briefs to be filed by 5-27-83
May 27	3	Pltf Trial Brief
May 27	4	Pltff Exhibits (1) 5 Letters, (2) School Dist Decision (3) Speaker Form
May 27	5	Answer Of Def
May 27	6	Def Memo Of Auth In Opp To Mot For Prelim Inj
June 3		Fof&Col Def
June 3	—	Declaratory Judmt Lodged
June 3	—	Fof&Col Pltff
June 3		Declaratory Jdmt Lodged
June 3	—	Proposed Injunction Lodged All Doc to Chambers Attn: JED
May 31	6a	Minutes Of Hearing on Tro & Merits Speak not Obscene Ct to Sign Decl Jdmt Def Mot to Stay Denied Hearing on Damages Set 7-25-83
May 25	2a	Praeipe Iss Trial Sub
June 1	6b	AFF Of Sve Upon Sean Madden
June 1	6c	AFF Of Sve Upon David Nusbaum
June 8	7	Fof&Col (Jet) CPS MLD
June 8	8	Injunction & Declaratory Jdmt CPS MLD
June 21	9	Motion To Amend Fof&Col

June 30	10	Order (Jet) Pltff Mot to Amend Fof&Col ... Denied CPS MLD
July 8	11	Notice of Appeal by defts. cc: ensl & C/A
July 18	12	Transcript Designation
Aug. 30	13	Pltff AFF Of Costs & Attny Fees
Aug. 30	—	Jdmt Lodged. To Deb for Chambers
Sept. 1	14	Jdmt (Jet) in Favor of Pltff \$278.00 Dam- ages, \$12,750.00 Costs & Fees CPS MLD
Sept. 6	15	Reporter's Transcripts of proceedings held 5-31-83 (Orig. & 1 copy)
Sept. 8	—	Certificate or Record spys to ensl & C/A
Sept. 15	16	Notice of Appeal By Def Upon Jdmt En- tered 9-1-83 Appeal Packet Sent to All Cnsl & 9 CCA Sent 9-20-83

**COMPLAINT FOR VIOLATION OF CIVIL RIGHTS
SEEKING DECLARATORY-RELIEF,
INJUNCTION, AND DAMAGES**

Plaintiffs allege:

I. PARTIES AND JURISDICTION

1. Plaintiffs Matthew N. Fraser and E.L. Fraser are a citizens of the United States of America and residents of Pierce County in the State of Washington. Plaintiff Matt Fraser is also a Senior enrolled at Bethel High School in Spanaway, Washington.

2. Defendants Christy B. Ingle, David C. Rich, J. Bruce Alexander, and Gerald E. Hosman, are now, and at all times material hereto were, employees of the Bethel School District No. 403 and residents of Pierce County.

3. Defendant Bethel School District No. 403 is a municipal corporation and governmental subdivision of the State of Washington located in Pierce County, and is empowered, among other things, to sue and be sued pursuant to RCW 4.08.120 and RCW 28A.58.010.

4. This action arises under the United States Constitution, particularly under the provisions of the First and Fourteenth Amendments to the Constitution of the United States, and under federal law, particularly Title 42 of the United States Code, Section 1983.

5. This court has jurisdiction of this cause under Title 28 of the United States Code, Sections 1343(3) and 2201.

II. FACTS OF THE CASE

6. The plaintiff, Matthew Fraser, is academically a very good student. He is a member of the Honor Society

and the debate team and has been awarded "Top Speaker" in statewide debate championships two years in a row.

7. In preparation for election of next year's student government officials, Fraser drafted a political nominating speech for a candidate for student body vice-president, extolling the leadership qualities of the candidate. The text of the speech is as follows:

I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds.

Jeff is a man who will go to the very end, even the climax, for each and every one of you.

So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

8. For those who are inclined to notice such things, the speech contains language with secondary meanings which have sexual connotations. The secondary meanings do not explicitly describe any sexual activity and the speech does not contain any patently offensive words.

9. The secondary meanings contained in the speech were intended by Matt Fraser to be serious rhetorical devices calculated to serve the political purpose of winning the election for his candidate. Just as adult politicians begin their speeches with a joke to develop a rapport with their audiences, Fraser used the most popular and common form of humor among students his age to develop such a rapport with his audience.

10. Before delivering this speech to the assembled students, Fraser privately presented his speech to three different Bethel High School teachers, seeking their comments.

11. Although he stated that it might "raise some eyebrows", one of the three teachers refrained from making any judgment and did not advise him not to give the speech.

12. The other two teachers indicated that they thought the speech was in poor taste and advised Fraser not to deliver it. However, the teachers left the decision up to Fraser. None of the teachers suggested that the speech might violate a school rule or subject Fraser to any kind of punishment. None of the teachers went to the administration prior to the assembly to suggest that they speak to Fraser regarding his speech.

13. On Tuesday, April 26, an all-school assembly was convened after the last class and just before the end of the school day for the purpose of presenting speeches for the election of student government officials. Students were not required to attend the assembly. Fraser delivered his speech at the time and place selected by school authorities.

14. Fraser's speech was well received by the students. The students indicated their approval by laughing, cheering, and clapping. No students visibly indicated disapproval. The speech created no student disturbance at the time of delivery, other than the same sort of applause and laughter which had been accorded previous speakers. The delay between Mr. Fraser's speech and his candidate's speech, which followed, was no longer than that between other speeches. The entire assembly was controlled without difficulty by a student, the ASB Vice-President. Following the speeches by Fraser and his can-

didate, the assembly was concluded and dismissed. Since the school day had ended, the students left the school building without incident.

15. The speech achieved its intended political effect. Fraser's candidate won the election by a wide margin.

16. During the preceding two years Fraser was an outspoken critic of the school and its administration, generating hostility from the administration and some members of the faculty. Fraser's criticism included oral comments and published editorials in the school newspaper.

17. Fraser particularly criticized Assistant Principal Morrison, accusing him of attempting to misuse public school funds to purchase sixty dollars worth of paint to repaint a local private bridge. Fraser further accused Morrison of switching the source of money for the purchase to the Student Council funds without obtaining prior approval ~~from~~ the Student Council or its Executive Board and then attempting to cover up this improper expenditure.

18. After the speech was delivered, Assistant Principal Morrison made statements to the effect that Fraser had finally made a speech for which he could be punished. Morrison further stated: "We can't let him get away with this one."

19. In the evening of April 26, the day the speech was given, Bethel Principal David Rich telephoned Fraser at home and told him to appear in the morning for disciplinary action. The following morning, Fraser met with Assistant Principal Christy B. Ingle about five minutes before the beginning of the first class. To give Fraser notice of the charges against him, Ingle simply provided Fraser with copies of the letters of five teachers regarding his speech. Three of the letters expressed personal

judgments that the speech was "inappropriate", "distasteful", "obscene", and contained "blatant sexual references".

20. Ingle gave Fraser an opportunity to respond to the charges contained in the letters. After reading the letters, Fraser defended himself orally for about 15 minutes. None of the letters indicated that his speech had disrupted the assembly nor that it had produced disruptive student conduct during or following the assembly.

21. Ingle concluded that Fraser's speech violated the rule against disruptive conduct which states:

Conduct which materially and substantially interferes with the educational process is prohibited including the use of obscene, profane language or gestures.

Ingle imposed punishment consisting of a three day suspension effective immediately and removal of his name from consideration as a graduation speaker.

22. Approximately one year ago another student published an essay in the school's literary magazine which, through sexual double meanings, described in detail the sexual conquest of a female by a male, including sexual intercourse. A copy of this essay is attached as Exhibit A. This student was not suspended for publishing the essay in the school magazine and was a speaker at graduation.

23. In a nomination speech given one year earlier, another student gave a speech of a similar character to Fraser's. This speech contained sexual secondary meanings that were at least as clear and received at least as much emphasis as the secondary meanings in Fraser's speech. This student was not suspended for delivering his speech.

24. Immediately after Ingle announced Fraser's punishment, Fraser indicated that he wished to appeal. Because the Principal, David Rich, was not at the school that day, Ingle stated that she was the appropriate subordinate official to rule upon Matt's request for immediate appeal. Ingle then denied the appeal, indicating that the suspension would not be stayed pending any further appeal.

25. Upon the return of Principal David Rich the following morning, Fraser appealed to the Principal seeking a stay of his punishment until further appeals could be concluded. The Principal denied Fraser's request to stay the suspension for Thursday, the second day of the suspension. The Principal stated that he did not want Fraser in school on Thursday to prevent Fraser from participating in student rallies and protests organized to object to Fraser's suspension from school.

26. However, the Principal granted Fraser's request to stay pending appeal the third day of suspension and the removal of his name from the ballot for graduation speaker.

27. Following Fraser's suspension, Bethel High School students put up posters, with their signatures affixed, opposing the administration's decision. Although the posters contained words with secondary sexual meanings which were as explicit as the words in Fraser's speech such as "Don't Be Hard On Matt" and "Stand Firm Matt", the Principal did not suspend or punish these students.

28. Through his counsel, Fraser requested in writing a grievance review from the District Superintendent, Gerald E. Hosman. A copy of the request for grievance review is attached as Exhibit B. Fraser's counsel also fur-

nished the Superintendent with a copy of the essay containing sexually explicit secondary meanings that was published the year before.

29. Two weeks after the request for review was submitted, the Superintendent's designee, J. Bruce Alexander, ruled against Fraser, upholding the school administration in all respects.

30. On May 19, after the Superintendent's decision was announced, Fraser informed the Principal that he would file this complaint in Federal Court. Then, disregarding Fraser's claim that an election for graduation speaker without Fraser's name on the ballot would be unconstitutional, and disregarding Fraser's request that his name be left on the ballot and an alternate be selected to speak in case it was later determined that Fraser could legally be precluded from being a graduation speaker, the Principal conducted the election without Fraser's name on the ballot.

31. Further administrative appeal to the District School Board would be futile and a waste of the limited time remaining before graduation, which is set for June 8.

32. School authorities have a recognized, and constitutionally permissible, societal role in inculcating community values. However, this legitimate State interest must be implemented in the manner which least restricts the rights of free speech under the First Amendment. In this case, alternative responses were available to the administration which would have a less chilling effect on free speech. In particular, school authorities could use more speech in a battle of ideas to persuade Fraser that this sort of speech is not appropriate for student politics. This approach would be constitutionally permissible because school authorities would not be using the power of their office to punish students whose speech does not con-

form to community values. In addition, this alternative approach is recognized by experts in the field as having preferable effects upon the education of the students involved.

33. Under the rules of the Bethel High School Honor Society, if Fraser's suspension is upheld, Fraser will be removed as a member of the Honor Society, permanently damaging his future career.

34. Fraser's unlawful two day suspension has caused him damages which cannot be remedied by equitable relief. Additional damages will be inflicted if further punishment is carried out.

III. LEGAL CLAIMS

35. The speech delivered by Fraser is protected by the First Amendment. The speech is not constitutionally obscene or disruptive. It was delivered at an appropriate time and place and in an appropriate manner. Punishment of Fraser under color of State law deprives Fraser of his ~~civil rights~~ to freedom of speech and chills the freedom of expression of all students of Bethel High School.

36. By presenting his speech to three teachers for their comments, Fraser gave school authorities opportunity for prior restraint. The failure of the three teachers to inform Fraser that his speech might violate school rules constitutes a license to Fraser to give the speech and estops school authorities from claiming a violation of the rules. Following this opportunity for prior restraint and implied license, the punishment of Matt Fraser violates his freedom of speech and rights to due process.

37. The selective enforcement of the rule against Matt Fraser, when it has not been enforced against other

students in similar situations, violates Fraser's right to equal protection. This selective enforcement also violates the First Amendment because Bethel students know that Fraser is being singled out as a result of his criticism of school administration, chilling the freedom of other students to criticize the administration.

38. As applied, the rule against disruptive behavior is unconstitutionally vague. It does not give adequate notice regarding what forms of behavior are proscribed, violating due process.

39. The vagueness of the rule against disruptive behavior causes it to be overbroad with respect to the First Amendment. The overbreadth chills freedom of speech by implying that even speech which might be constitutionally protected is proscribed.

40. Precluding Fraser from being a graduation speaker is not a constitutionally valid punishment. Fraser was given no notice that such punishment might be imposed for the violation of any rule, infringing Fraser's rights to due process.

41. Assistant Principal Ingle's consideration of Fraser's request for immediate appeal violated Fraser's right to due process. Although the most appropriate person to consider the appeal, the Principal, was not available, the appeal should have been considered by another official, perhaps Assistant Principal Morrison or the Superintendent, because Ingle was the original decision-maker.

42. The failure by Principal David Rich to stay pending appeal the second day's suspension as well as the third day's suspension violated Fraser's right to speech and assembly because the reason for the distinction was to

prevent Fraser's participation in rallies and protests by students criticizing the administration.

WHEREFORE, plaintiff seeks a judgment:

43. Declaring that the actions of Ms. Christy B. Ingle, Mr. David C. Rich, Dr. J. Bruce Alexander, Dr. Gerald E. Hosman, and Bethel School District No. 403 interfering with and punishing plaintiff's exercise of First Amendment rights, under color of law, are illegal and unconstitutional.

44. Entering a preliminary and permanent injunction restraining the agents and employees of the Bethel School District from imposing additional punishment or penalties upon Fraser and enjoining the Bethel School District from excluding Fraser as a graduation speaker.

45. Awarding damages to the plaintiff in an amount to be proved at trial.

46. Awarding plaintiff reasonable costs for attorney's fees and costs incurred in this action, as provided for in Title 42 of the United States Code, Section 1988.

47. Granting plaintiff such other and further relief as may be just.

DATED this 20th day of May, 1983.

/s/ JEFFREY T. HALEY,
Attorney for Matthew Fraser
and E.L. Fraser

American Civil Liberties Union
Of Washington Foundation

COMPLAINT EXHIBIT A

A Sensual Armageddon

Johnnie traversed the forboding bedlands in his specially equipped military tank, the F-69. The unique traction treads, developed for the demanding conditions of this particular mission, gently carressed the desert sands. He sped forward, the sheer weight of the mission burdening his mind. Ahead lay the enemy territory, a, so far, untouched land. Basically, Johnnies's mission would take him into enemy land and, by establishing a false sense of security, penetrate and destroy the enemy.

He guided the tank off of the sands of the bedlands and onto the forbidden land. His compass needle pointed south, toward the mountains. He was to climb and explore at least one of the mountains and use the peak as a vantage point to observe conditions to the south.

His treads, specially designed to grip the smooth surface of the almost symmetrical mountain without marring the terrain, traced his path up the first sharp, then steadily decaying slope. At the peak he stopped and let his motor warm up more in preparation for what lay ahead. His return trip took him down the side of the mountain toward the cleavage which formed a pass between the northern shoulder of the land and the barren flatlands to the south.

Once down the mountain through the pass, he raced the tank's engine across the flatlands. Sweat beaded off his forehead. His pulse quickened. His breathing deepened in anticipation. If it was going to happen, it would and soon. He could feel it in the air. Soon it would be over.

His vehicle was almost thrown from its path by the rhythmic, heaving earthquakes created by deep, internal activity beneath the land created by the enemy. This meant that his presence had been detected, but this did not worry him. The enemy, try as it may, could not resist his advances. He had come too far to turn back.

He passed through the citrus groves in the lower, more seismically active area of the lowlands. The thought of, perhaps, stopping for a moment and savoring one of the naval oranges passed through his mind. His mission, however, drove him on.

His treads rested now on the sands of the southern bedlands. The fork peninsula jutted south on either side. Under Johnnie's command at the controls, the tank spun around 180 degrees and faced northward, toward the target area, a weakly camouflaged entrance to the underground enemy bases.

A switch activated the turret motors, raising the enormous cannon in readiness for battle. The F-69 was now the picture of combat readiness with the long, large cannon barrel jutting horizontally forward. A second switch armed the twin shell chambers with the modified charges.

Johnnie's mission was to ram the unprotected entrance with the gun. Once the barrel was completely engulfed in the entrance, the twin shells would fire, starting a chain reaction deep within the womb of the base. Johnnie would, after this glorious day, go down in history as the man who conceived the birth of a war.

—Jim Dempsey

COMPLAINT EXHIBIT B

LAW OFFICE OF
JEFFREY T. HALEY
500 PIONEER BUILDING
ONE PIONEER SQUARE
SEATTLE, WASHINGTON 98104

MELVYN J. SIMBURG
OF COUNSEL

(206) 623-7007

May 3, 1983

Dr. Bruce Alexander
Bethel School District No. 403
516 E 176th
Spanaway, WA 98387

Re: Matt Fraser v. Bethel School District No. 403

REQUEST FOR GRIEVANCE REVIEW

This request for grievance review outlines the claims of Matt Fraser. It does not present a detailed argument. If so requested by the District, Matt Fraser will present oral or written detailed argument that the speech in question is protected by the 1st and 14th Amendments to the United States Constitution and is not, under constitutional legal standards, disruptive or obscene.

1. *Statement of the Facts*

On April 26, 1983, Matt Fraser delivered a nomination speech for his candidate for Bethel High School ASB vice-president at an all-school assembly. A copy is attached. After the speech, Matt Fraser was notified by the school administration that the speech was objectionable and that he should expect disciplinary action. Mr. Fraser was offered an opportunity to rebut the allegations that the speech was obscene and in violation of a school rule which states:

“Conduct which materially and substantially interferes with the educational process is prohibited including the use of obscene, profane language or gestures.”

Mr. Fraser was then informed that he would be suspended from school for three days, effective immediately, and that his name would be removed from the ballot for graduation speaker.

Upon request by Mr. Fraser and notification of his intent to appeal, the school principal allowed Mr. Fraser to return to school after two days suspension and agreed to leave undisturbed Mr. Fraser's eligibility to be graduation speaker until the appeal could be resolved.

During the preceding two years, Mr. Fraser had written a number of editorials in the school newspaper which were critical of members of the school administration.

Approximately one year earlier, another student gave a nomination speech for a candidate for student office that was similar in character to the speech given by Mr. Fraser. That student was not suspended from school. Also during the preceding year, another student published in a student publication an essay of a similar character to Mr. Fraser's speech. This student was also not subjected to suspension or precluded from the possibility of being graduation speaker. In fact, he was the graduation speaker at the end of that year.

2. *Grievance Claims*

a. *Fraser's speech is protected political speech.*

As citizens of the United States, students have rights of free speech even in the school context. Students do not “shed their constitutional rights to freedom of speech or

expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Under the Constitution, political speech is accorded the highest level of protection. The speech given by Mr. Fraser was a political speech, given in an appropriate time, place, and manner, for the purpose of electing his candidate to student government office. His speech will be given the highest level of protection by the courts.

" . . . conduct by the student, in class or out of it, which for any reason — whether it stems from time, place or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech". *Tinker*, cited above. Fraser's speech did not materially disrupt class work or involve substantial disorder. In the context of a political nominating speech, laughter and cheering on the part of the students cannot be considered disorder.

Speech which is obscene under community standards, is not protected by the First Amendment. Under constitutional standards, speech is obscene in the high school context only if it meets each of three tests. First, the average person must find that the speech appeals to the prurient interest of minors. Second, the work must depict, in a patently offensive way, sexual conduct specifically defined by applicable state law. And third, the speech, taken as a whole, must lack serious literary, artistic, political or scientific value. See *Miller v. California*, 413 U.S. 15, (1973). *Ginsberg v. New York*, 390 U.S. 629 (1968).

Although the speech did contain secondary meanings with sexual connotations, the speech did not depict any de-

fined sexual conduct. The sexual secondary meanings were used as a serious rhetorical device for political purposes. Just as adult politicians begin their speeches with a joke to develop a rapport with their audiences, Mr. Fraser used the most popular and common form of humor among students his age to develop such a rapport with his audience. This rhetorical device was used for the political purpose of winning the election for Mr. Fraser's candidate. This purpose was achieved.

b. *Fraser was singled out for punishment.*

The speech given by Mr. Fraser was not more obscene or more explicit than the similar nominating speech delivered one year earlier or the suggestive essay published that year. In contrast to the other two students, Mr. Fraser has been singled out because he has frequently criticized the administration in editorials published in the student newspaper.

3. *Conclusion and Request for Relief.*

Because Mr. Fraser's speech is protected by the First Amendment, he may not be subjected to any punishment or deprivation of privilege as a result of his speech. If school administrators find the speech distasteful, immature, or unwise, their appropriate remedy is more speech. It would be appropriate for them, as educators, to tell Mr. Fraser, and the other students, why they feel that this behavior is distasteful or inappropriate. Through additional speech, they might even criticize, humiliate, or ridicule Mr. Fraser. It is appropriate for them to try to influence Mr. Fraser and the other students through a battle of ideas; but it is not appropriate for them to use the power of their

office to punish Mr. Fraser for exercising his rights of free speech even though his speech may have been distasteful.

Mr. Fraser requests that his rights of free speech be vindicated by a reversal of the decision by school administrators. If the Superintendant overrules the school administrators by concluding that Mr. Fraser's speech did not violate the rule in question, the matter will be settled. If the Superintendant concludes that the speech violated the rule, then the rule is unconstitutional and must be stricken. Any conclusion that Mr. Fraser violated school rules as a result of this speech deprives Mr. Fraser of his civil rights, chills the rights of free speech held by all students, and gives Mr. Fraser a cause of action in the courts.

Respectfully submitted,

Jeffrey T. Haley
Attorney for Matt Fraser
American Civil Liberties Union
of Washington Foundation

SCHOOL ASSEMBLY 4-26-83

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

ANSWER OF DEFENDANTS

(Filed May 27, 1983)

COME NOW the Defendants, and for answer to Plaintiffs' Complaint, admit, deny, and allege as follows:

I.

1. Defendants admit the allegations of paragraph 1.
2. Defendants admit the allegations of paragraph 2.
3. Defendants admit the allegations of paragraph 3.
4. Concerning paragraph 4 of Plaintiffs' Complaint, Defendants admit only that Plaintiffs allege violations of constitutional provisions and the laws cited, and deny any other allegations.
5. Paragraph 5 calls for a legal conclusion and is not the recitation of facts which Defendants must admit or deny.
6. Defendants admit the allegations in paragraph 6.
7. Defendants admit only that the text of the speech quoted in paragraph 7 is substantially the same as that delivered by Matthew Fraser in a school assembly on April 26, 1983. The remaining allegations of paragraph 7 are Plaintiff Fraser's characterization of his intent and motive in delivering the speech and Defendants deny the same.
8. Concerning paragraph 8 of Plaintiffs' Complaint, Defendants admit that the language of the speech has sexual connotations, but deny the remaining allegations.
9. Defendants deny the allegations of paragraph 9.

10. Defendants admit the allegations of paragraph 10.

11. Defendants deny the allegations of paragraph 11.

12. Concerning paragraph 12 of Plaintiffs' Complaint, Defendants admit that two (2) other teachers talked with Plaintiff Fraser prior to delivering the speech the remaining allegations are Plaintiff's characterization of these conversations and Defendants' deny the same.

13. Concerning paragraph 13 of Plaintiffs' Complaint, Defendants admit that on April 26, 1983, an all school assembly was convened after the last school class and prior to the end of the school day for the purpose of presenting speeches for the election of student government officials. Defendants further admit only that students were either required to attend the assembly or to attend a study hall. Defendants deny the remaining allegations of paragraph 13.

14. Concerning paragraph 14 of Plaintiffs' Complaint, Defendants admit only that Fraser's speech and Mr. Kuhlman's speech were last on the agenda, and that students were dismissed from school following its conclusion. Defendants deny the remaining allegations of paragraph 14.

15. Concerning paragraph 15 of Plaintiffs' Complaint, Defendants admit only that Mr. Kuhlman, Matthew Fraser's candidate, won his election, and deny the remaining allegations.

16. Defendants admit that Mr. Fraser criticized the administration both orally and in writing. Defendants deny each and every other allegation in paragraph 16.

17. Defendants deny each and every allegation found in paragraph 17.

18. Defendants deny the allegations of paragraph 18.

19. Defendants admit that on the evening of April 26, 1983, the day the speech was given, Bethel Principal Dave Rich telephoned Fraser at home and told him to appear in the morning in his office. Mr. Rich advised Fraser that he should bring his parent(s) as there was the possibility of discipline action. Regarding the remaining allegations, Defendants admit that Fraser was provided with copies of letters from five (5) teachers regarding his speech, but because the remaining allegations of the last two sentences of paragraph 19 are Plaintiffs' characterization of Defendant Ingle's action and the content of the letters, Defendants deny the same.

20. Defendants admit the allegations of the first two sentences of paragraph 20, and deny the remaining allegations.

21. Defendants admit the allegations of paragraph 21.

22. Defendants admit the allegations of paragraph 22.

23. Concerning paragraph 23 of Plaintiffs' Complaint, Defendants admit only that a speech was delivered one year earlier that contained a single sexual reference and that the student was not suspended. Defendants deny the remaining allegations of paragraph 23.

24. Defendants admit that immediately after Ingle announced Fraser's punishment, Fraser indicated that he wished to appeal. Because the Principal, Dave Rich, was

not at the school that day, Ingle stated that either herself or Assistant Principal Morrison were available to hear the appeal. Ms. Ingle suggested to Mr. Fraser that since she had imposed the suspension, he should appeal to Mr. Morrison. Mr. Fraser indicated he would rather appeal to Ms. Ingle. Ingle then denied the appeal, indicating that the suspension would not be stayed pending any further appeal.

25. Defendants admit the first two sentences of paragraph 25, but deny the remaining allegations.

26. Concerning paragraph 26 of Plaintiffs' Complaint, Defendants admit only that Dave Rich granted Fraser's request to stay his suspension and removal of his name from the graduation ballot until the determination of his appeal at the Superintendent's level. Defendants deny each and every other allegation in paragraph 26.

27. Concerning paragraph 27 of Plaintiffs' Complaint, Defendants admit only that some Bethel High School students put up posters and plaque cards concerning Matthew Fraser's suspension, that the posters and plaque cards contained sexual references, and that the students were not subjected to disciplinary action. Defendants deny the remaining allegations of paragraph 27.

28. Defendants admit the allegations of paragraph 28.

29. Defendants admit the allegations of paragraph 29.

30. Defendants admit the first sentence of paragraph 30 of Plaintiffs Complaint. Defendants also admit that a ballot for graduation speaker was distributed to students

without Matthew Fraser's name, the election was conducted, and that Matthew Fraser had requested that no action be taken prior to the conclusion of his law suit. Because the remaining allegations are simply Plaintiffs' characterization of these facts, Defendants deny the same.

31. Concerning paragraph 31 of Plaintiffs' Complaint, Defendants admit only that graduation is set for June 8, 1983, and for Plaintiff's constitutional claims regarding first amendment rights of free expression that further administrative proceedings would be futile. Defendants deny the remaining allegations of paragraph 31.

32. Because paragraph 32 is simply Plaintiffs' characterization of certain legal and societal issues and does not contain allegations of fact, the Defendants deny the same.

33. Defendants deny the allegations of paragraph 33.

34. Defendants deny the allegations of paragraph 34.

35. Defendants deny the allegations of the following paragraphs in their entirety, paragraphs 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, and 47.

II.

BY WAY OF FURTHER ANSWER AND AFFIRMATIVE DEFENSES, DEFENDANTS ALLEGE:

1. Bethel High School's rule concerning disruptive conduct is constitutionally valid and prohibits disruptive conduct and obscene speech.

2. The speech Matthew Fraser delivered on April 26, 1983, was obscene in violation of Bethel High School's disruptive conduct rule.

3. Plaintiff Fraser's speech also caused a material and substantial interference with the educational process in violation of the disruptive conduct rule.

4. The District's action, three day suspension and removal of Matthew Fraser's name from the list of candidates for graduation speaker, did not violate his constitutional or statutory rights under federal or state law.

5. A short term suspension of three days and excluding Plaintiff from consideration as a graduation speaker are not punishments severe enough to invoke the court's jurisdiction under the Fourteenth Amendment of the United States Constitution.

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendants respectfully request the court to dismiss the same, enter judgment in favor of Defendants, and award Defendants its costs and disbursements herein and any other relief the court deems just and equitable.

DATED this 27 day of May, 1983.

KANE, VANDEBERG, HARTINGER
& WALKER

By: /s/ WILLIAM A. COATS, Of
Attorneys for Defendants

EXCERPT FROM REPORTER'S TRANSCRIPT

* * * * *

[Testimony of Irene Hicks]

(p. 27) *Direct Examination*

By Mr. Coats:

Q Would you state your full name, please?

A Irene Susan Hicks.

Q By whom are you employed?

A Bethel School District.

Q How long have you been so employed?

A About ten years.

Q In what capacity?

A Oh, a variety of things, foreign language teacher, English teacher, journalism teacher.

Q Do you have a relationship to the newspaper at the Bethel School District?

A Yes, for the past three years I have been advisor to the newspaper.

Q Do you know Mr. Fraser?

A Yes, I do.

Q Is he one of your students?

A Yes, he is.

Q Have you supervised him on his newspaper activities?

A I have worked with him on the newspaper.

Q You are aware that Mr. Fraser has asserted that there has been retaliation for his having written columns for the newspaper, have you seen any evidence of that?

A I haven't seen any evidence of retaliation.

(p. 28) Q Has he written particularly critical articles about the administration?

A Some may interpret them as critical.

Q Have other students done that as well?

A Oh, yes.

Q Have you ever seen any retaliation at Bethel from the administration for those articles?

A I haven't.

Q Were you present at the assembly on April 26th?

A Yes, I was.

Q Where was this assembly?

A It was in our gymnasium.

Q About how many students were there?

A Oh, I would say about 600.

Q Where were you during the assembly?

A It is my duty to sit within the senior section, so I was about halfway up amidst the seniors.

Q You heard Mr. Fraser's speech?

A Yes, I did.

Q What was the student reaction to his speech?

A The best way to describe it, I think, is mixed. There were pockets of loud clapping, hoots and hollering

and then there were other students that were sitting there, I guess my best words to describe it is as rather bewildered, not understanding what the kids were clapping (p. 29) about and why there was such a difference in reception to the speech.

Q What was your response to the speech?

A I thought it was very poor. I thought it was inappropriate for a school assembly. I don't like people to talk about male sexual response in front of me or students.

Q Did you have an emotional reaction to it?

A I was — yes, I was displeased by it and I immediately went to the principal and I said, did you — Matt Fraser just gave a dirty speech, was my response to him.

Q Did other students seem to have a similar response?

A The kids were, as I said, some were just kind of bewildered and the others were just saying, yahoo, wonderful, we are all for it, great.

Q What did you do after the assembly?

A Immediately after the assembly I talked to the principal.

Q Who was that?

A Lee Morrison, the principal.

Q What did he do?

A He was very calm. He just listened to me, I think, he kind of calmed me down, because I was a little upset at the time. Then I walked out of the assembly and shortly thereafter he called me into the office where I met with Matt, another teacher who was upset about the speech, (p. 30) the AFP president of the students who was there

and the assistant principal asked Matt to deliver a copy of the speech.

Q Was anything else said at that conference?

A I believe that the assistant principal asked him to come to school the next morning and be prepared for some sort of disciplinary action.

Q You are aware that Mr. Fraser tried out to be a graduation speaker?

A Yes.

Q Did you have any discussion with him concerning that?

A Yes, I did. There is a — do you want me to tell a little about the history of that?

Q Go ahead.

A There is a graduation committee that sets up the graduation. It is composed of students and the assistant principal. Apparently the kids have to try out to be a graduation speaker before a panel of kids and teachers and when they try out then if their speech is acceptable then they are put on the ballot for graduation speaker. Matt gave a speech that I heard about, because everybody said, boy, you wouldn't believe it, it was so beautiful, it was so nice, it was so saccharine almost in its approval of everything that had happened in the Bethel School District and I was a little bit astounded, (p. 31) because I know Matt as a critical thinker and I thought it was a little bit out of character.

I did mention it to an administrative intern and I believe he took that information to the principal. I did hear

Matt talking to another student in my newspaper class and smiling when the other student said, Matt, that is not really you, is it, and Matt shook his head and he says, no.

Mr. Coats: That is all the questions I have.

Cross-Examination

By Mr. Haley:

Q Mrs. Hicks, did you preview Matt Fraser's speech before he delivered it to the students?

A Preview is not the right term, can I explain how I saw it?

Q Did you see Matt Fraser's speech before he delivered it to the students?

A I not only saw it, he read it to me.

Q Did you suggest to Matt Fraser that delivery of the speech might violate a school rule or subject him to punishment?

A I told Matt that his speech was inappropriate and that he probably should not deliver it.

Q Did you suggest to Matt Fraser that the delivery of the (p. 32) speech might violate a school rule or subject him to punishment?

A I wasn't aware that there was a school rule regarding that.

Q Is your answer no?

A Did I suggest to him that he would be breaking a school rule?

Q Yes.

A No, I told him his speech was inappropriate.

Q Is your answer no to my question?

A That is correct.

Q Did you alert the administration that Matt Fraser intended to give the speech?

A No, I didn't.

Q In the meeting with assistant principal Morrison, did assistant principal Morrison want your statement about the speech in writing?

A Yes, he did request that.

Mr. Haley: Thank you, that is all.

Redirect Examination

By Mr. Coats:

Q When you reviewed Mr. Fraser's speech, where was that?

A It was in my newspaper production room.

Q What was going on at that time?

(p. 33) A We were one day before deadline. It was approximately ten minutes before the assembly bell and I had several students around me. I was correcting copy, talking to two or three at once. Matt came in and said, do you want to hear the speech that I am going to give to the assembly today and he gave it to me on a crumpled up piece of paper, single spaced and I said, Matt, I don't want to read that, why don't you just read it to me and then he read the speech.

Q Did you find the speech offensive?

A Yes, and I think the students around me did too. There were four or five students around me at that time who heard it.

Q You indicated that you weren't aware of the rules, are you in charge of discipline in the building?

A No, teachers don't suspend students. I feel my job as a teacher is to help them make correct judgments. I don't normally haul kids by the back of the neck down to the office.

Q How long before the assembly did this conversation take place?

A I would guess ten or fifteen minutes.

Mr. Coats: That is all the questions I have.

Mr. Haley: If I may recross.

The Court: Go ahead.

(p. 34) *Recross-Examination*

By Mr. Haley:

Q Are teachers at Bethel High School requested by the administration to enforce school rules?

A Umm hmm.

Mr. Haley: That is all.

The Court: Let me ask a question. This question of prior approval of candidates to be commencement speakers, isn't that a form of censorship, in other words, the teachers that hear it have the absolute say if that person can appear on the ballot whether their speech is appro-

priate or not. Do they have to actually give you the speech that they are going to give at commencement?

The Witness: As I understand it, it is mainly students, there are very few teachers there and I don't know, if that is your definition of censorship that is the way it has been set up.

The Court: You are the one that says, it was either you or you overheard a conversation, was that either you, Matt, who was it other than Matt that gave it?

The Witness: It was out of character for Matt to give that sweet a speech concerning the administration.

The Court: That sweet of speech, how would I (p. 35) characterize that, that sweet of speech, I think you said saccharine.

The Witness: Umm hmm.

The Court: That is sweeter than sugar.

The Witness: A substitute for sugar.

The Court: That sweet of speech, is there some definition that one could that was outside the Bethel School District that could examine such procedures and come up with some reasonable explanation of what you are talking about, or does that mean that someone agreed with him or didn't agree with him.

The Witness: Are you asking me my opinion?

The Court: Yes, what if he got up and made a speech that in his opinion the Bethel School District should be abolished, would that be acceptable.

The Witness: I would say that is probably more in character.

The Court: Or he is different?

The Witness: Umm hmm.

The Court: Any redirect examination based upon the Court's questions.

Mr. Coats: No.

Mr. Haley: No, your Honor.

The Court: All right, you may step down.

Next witness.

(p. 36) GARY W. McCUTCHEON, having been first duly sworn upon oath by the Clerk, testified as follows:

Direct Examination

By Mr. Coats:

Q Would you state your full name, please?

A Gary Wayne McCutcheon.

Q By whom are you employed?

A Bethel School District.

Q In what capacity?

A The last year and a half I have been a counselor at Bethel High School.

Q Before that, by whom were you employed?

A In total I have been employed by the Bethel School District for three years and the first year and a half was as a school psychologist.

Q Did you attend the assembly on April 26th?

A I sure did.

Q Did you see and hear Mr. Fraser's speech?

A I surely did.

Q Could you describe the student reaction, please?

Mr. Haley: Your Honor, I object. This is hearsay and irrelevant as to what he saw and the reaction of the students.

Mr. Coats: I am asking what he saw, I don't understand how that is hearsay.

(p. 37) The Court: Does it differ from the last witness.

Mr. Coats: There is going to be some additional information.

The Court: Go ahead.

A (By witness) Would you like what I heard or what I saw?

Q (By Mr. Coats) Let's first go with what did you hear from the student body?

A Not too dissimilar to what Mrs. Hicks just reported, the students were pockets of high volume conversations, hooting, yelling, which is not a typical to a high school auditorium assembly and the auditory, the sounds were not too dissimilar to any auditorium sounds I have heard over the many assemblies I have been at Bethel High School.

Q Were there physical activities as well?

A I think of particular interest might be perhaps was something I hadn't seen before. I had seen one student on the side of the bleachers where I was sitting actually simulate masturbation and two students on the opposite bleachers were simulating the sexual intercourse movement with hips.

Q Can you show us what you mean?

A I prefer not to.

Q I will defer to that, was there any student reaction to (p. 38) all of this other than the ones that were hooting?

A Student reaction to the three cases I mentioned?

Q Some students were hooting and some students were acting out, were all of the students doing that?

A No, one student in the first case and two students in the opposite bleachers in the second case. That is the only three I noticed that were doing anything that was different.

Q Did you note any student reaction to this conduct?

A I think — gee, I can't pinpoint it, I say in general a couple of students around that particular three individuals were getting more aroused volume wise with their voice, I would say.

Q Where were you situated during this?

A In the bleachers, up near the top of the bleachers in one section.

Q Were you free to leave during this assembly?

A I could have either jumped off the bleachers ten feet down and left or crowded down through the students and it would have been quite a feat to get down through the students during an assembly, so yes, I could have done that, but it would have been very hard to do.

Q During the assembly were the students free to leave at any time?

A Students could walk out, if someone wanted to go to the (p. 39) restroom they could walk out and leave, or if there was some other reason where they felt ill or something like that I suppose they could leave. There is nobody at the door saying, stay in.

Mr. Coats: That is all the questions I have.

The Court: Cross-examination.

Mr. Haley: I have no questions.

The Court: Mr. McCutcheon, you referred to something that individual students were doing that you characterized and described their movements, is this unusual for 16, 17 or 18 year old students to be curious about sex?

The Witness: Not at all.

The Court: Do you think that you have the expertise to determine whether 16, 17 or 18 year old students understand masturbation?

The Witness: If anybody has expertise I think that with my experience and my general knowledge I would have.

The Court: Would you agree that different people would have different ideas about that type of thing?

The Witness: You mean whether it is acceptable or condone it.

The Court: Yes, wherever they might want to (p. 40) practice it.

The Witness: I think it is a clear social standard, at least in my mind. I have never seen even students imitate those two behaviors in public on the high school campus.

The Court: Were those students charged by you, sir?

The Witness: What did you want?

The Court: Were they charged by you with any misconduct?

The Witness: No, I have no authority over student conduct other than referring people to the administrator. I can certainly encourage students to do the right thing —

The Court: I know, but did you do that in these situations where you say you had never seen that type of conduct?

The Witness: Did I go up to them and indicate something to them?

The Court: Was the speech the cause of it or was that just a proclivity at that time and place to exhibit or act out that way?

The Witness: I can't think cause, I think cause, people's motivations come from several directions.

The Court: Thank you, I have no further (p. 41) questions.

Redirect?

Redirect Examination

By Mr. Coats:

Q You had never seen that activity at any other time at Bethel High School?

A No, I have seen people move their hips like in sexual intercourse to and fro, but not the masturbatory activity.

Q Have you ever seen that conduct at an assembly?

A No, I haven't, as I just said, I haven't seen it.

Q Or that conduct at any organized school activity?

A I have not personally seen it.

Q This occurred during Mr. Fraser's speech?

A It did.

Q Now when you say you can't tell the cause you assume that Mr. Fraser's speech had something to do with this activity?

A Without a doubt. There are motivations and that may have been for those particular three students, I think that was a prompting or fostering of that particular behavior.

Q You have reviewed Mr. Fraser's speech or you heard it?

A Certainly.

Q Was, based on your experience, students of that age (p. 42) suggest sexual activity from the wording that was used in that speech?

A You mean was there a deep message or sexual innuendo in that message, clearly.

Mr. Coats: Thank you.

The Court: Mr. McCutcheon, isn't that sort of in the eyes of the beholder, like beauty, didn't I read something about one of your teachers that is a communications expert and he didn't take it that way?

The Witness: Well, I don't know about expert testimony, I have been teaching psychology for many years and I am a licensed psychologist, but as far as getting into language communication, metamessage, paralanguage, etcetera, purely innuendo means double message —

The Court: Do you know a Mr. Shawn?

The Witness: I certainly do.

The Court: What is his last name?

The Witness: Mr. Madden.

The Court: Mr. Madden says, over all, nothing was said which could be in and of itself offensive, is this true with him?

The Witness: I disagree —

Mr. Coats: I want Mr. Madden to testify about that.

The Court: It is part of the letter in the (p. 43) exhibits.

Mr. Coats: It has not been admitted, it was sent into the Court unilaterally.

The Court: What is the difference?

Mr. Coats: I am going to cross-examine him.

The Court: You can do anything you want, you can call whoever you want. Why can't we, what are we hiding?

Mr. Coats: I am not trying to hide anything.

The Court: The nature of the TRO in the declaratory judgment you put everything in the affidavit and supporting documents. If you read the rule the Court is to consider them.

Mr. Coats: I called the Court's clerk and I asked her if you do this and that —

The Court: I don't care who you called, counsel, I am telling you what the rules are and if you want to call Court clerks that is your problem and I merely asked Mr. McCutcheon if he agreed with Mr. Madden. Do you sir?

The Witness: No, I don't.

The Court: That is the answer, he doesn't agree with him. Any other questions.

Mr. Haley: No, your Honor.

The Court: All right, you are excused. Next?

(p. 44) Mr. Coats: I call Debbie Carmandi.

DEBBIE L. CARMANDI,	having been first duly sworn upon oath by the Clerk, testified as follows:
---------------------	--

Direct Examination

By Mr. Coats:

Q Would you state your full name, please?

A Debbie Laurie Carmandi.

Q By whom are you employed?

A Bethel School District.

Q In what capacity?

A Home Ec teacher.

Q How long have you had that position?

A Six years.

Q Were you at the assembly on April 26th?

A No.

Q When was the first time you heard about the speech?

A The next day in my first period class.

Q What was the context of your hearing about it?

A I was trying to teach my class and they were chatting away and so finally I decided, okay, what is the deal here, what is going on and they started telling me. They said, were you at the assembly yesterday and I said no and they said, you didn't hear about Fraser's speech and I said, no, so they started telling me about it.

Q You started teaching a class not knowing about this (p. 45) speech?

A No.

Q How long did you teach the class?

A Probably, I don't know, about ten minutes or so. I guess.

Q Can you explain to the Court why you stopped the class to discuss the speech?

A Because they weren't paying attention to me.

Q Why?

A Because they were chatting about the speech.

Q What did you do when you found that out?

A When I found — wait a minute —

Q That they were talking about the speech?

A I stopped and I said, I don't understand, what is going on, so they started telling me about the speech, you know, what had happened at the assembly and they were talking about it, you know, just that.

Q How long did they stay?

A Well, okay, probably I don't know, five or seven minutes and then I tried to go back to teaching. I said, okay, well whatever and started to try to teach again and they weren't ready to quit yet. So then we probably talked about it for a couple more minutes and they wanted to know what was going to happen and I said, I don't know, I didn't even hear the speech. So then after about two or three more minutes we went back.

(p. 46) Q Did this impact your classes the rest of the day?

A Umm hmm.

Q In what respect?

A Well, all of the kids were talking about it all day long and as the day continued, of course, you know, everyone was talking during classes and in between classes and stuff as the day went on. They just talked more and more

about it and it just seemed like by fifth period that is all they were talking about.

Mr. Coats: That is all the questions I have.

The Court: Cross-examination.

Cross-Examination

By Mr. Haley:

Q Mrs. Carmandi, are teachers responsible for maintaining order in the classroom?

A Umm hmm.

Mr. Haley: That is all I have.

Mr. Coats: I have no further questions.

The Court: You may be excused. Call your next witness.

Mr. Coats: I will call Matt Fraser. Has a copy of his speech been admitted.

The Court: I have considered it if you are offering it, it is the same thing. I have read it.

(p. 47) MATT FRASER, having been first duly
sworn upon oath by the
Clerk, testified as follows:

Mr. Haley: I think, counsel, we will stipulate that both the text stated in the complaint and the text stated in the defendant's brief are completely correct.

The Court: Go ahead.

Direct Examination

By Mr. Coats:

Q First of all, state your full name, please?

A Matthew Neil Fraser.

Q You are a student?

A Correct.

Q What year are you, Matt?

A I am a senior now.

Q How old are you?

A Seventeen years old.

Q You gave a speech on April 26th, 1983 to the assembly?

A Correct.

Q We have agreed that that has been admitted in evidence. What was the purpose of the speech?

A The purpose of the speech when I wrote it was to amuse the audience and hopefully to establish a rapport with the audience so that I could get my candidate elected.

Q It was a nominating speech for a candidate?

(p. 48) A Correct.

Q You start off in the speech and you say, "I know a man who is firm, he is firm in his pants." What were you trying to convey when you said he was firm in his pants?

A Well, it goes along with the rest of the sentence in context. The first meaning, I agree there is a secondary

meaning there, the first meaning and the one that everybody was supposed to get was that I was supporting this character saying he was firm in his pants, he was firm in his shirt and his character was firm and overall he would be very firm for the students at Bethel.

Q What I want to know is that you say, he is firm in his pants, what does that have to do with this particular political belief of this particular candidate, how does that add to the sentence?

A In the same way that he is firm in his shirt does, it supports it by using metaphors, I believe and it supports it by saying overall, you know, he is firm throughout and he would go for the students and do what needed to be done.

Q When you say he is firm in his shirt, what does that have to do with it?

A It is just using an example to show, you know, how he is firm, how to give the audience a picture and hopefully they will pick up on it and they will say, you got it.

(p. 49) Q You deliberately used sexual innuendoes in this speech, did you not?

A Yes.

Q You anticipated that when you gave this speech that the audience would perceive the sexual innuendoes, did you not?

A I expected that some people would pick it up, yeah.

Q Did you discuss it with any students before the assembly?

A Yes.

Q What students did you discuss it with?

A I discussed it with several students. I discussed it with the candidate who I was giving the speech for, Jeff Kuhlman, one of the opposing candidates, Jeff Upchurch and I discussed it with my debate partner as we were walking on our to the assembly, Noekie Taylor, and there might be some others, I can't recall at this point.

Mr. Coats: Judge, what I have is a tape of his speech that was given that I think we have agreed as to its authenticity, that was recorded by a student, if I could play that, would you agree, counsel?

Mr. Haley: Counsel for plaintiff has no objection to playing the tape recording.

Tape Recording: (Played by Mr. Coats) "I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of (p. 50) all, his belief in you, the students of Bethel, is firm.

"Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.

"Jeff is a man who will go to the very end—even the climax, for each and every one of you.

"So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be."

Q (By Mr. Coats) Now, I noticed when that was given before you say, "I know a man who is firm," that a bunch of people started to yell seemingly in anticipation of your speech, had you discussed it with them?

A Oh, no, I didn't discuss it with a large number of students. That was simply the attitude of the whole assembly was, you know, somebody gets up to speak they yell, yay, and some people were yelling, I heard on the tape, speak, speak, that was the ones who seemed very loud and boisterous and they wanted to hear me give a speech. They knew nothing about what kind of a speech it was.

Q A number of students knew that you were going to give this speech?

(p. 51) A About four or five.

Q Did you review this speech with Mr. DeHart?

A Mr. Steve DeHart, yes.

Q Did Mr. DeHart tell you that you might be suspended for giving the speech?

A No.

Q Did he tell you it was inappropriate?

A No.

Mr. Coats: That is all the questions I have.

Cross-Examination

By Mr. Haley:

Q Matthew, you said that you attend Bethel High School, have you achieved any academic honors at Bethel High School?

A Yes.

Q Can you mention a few of those?

A I am a member of the Honor Society. I received top speaker in the State in debate two years in a row. I won a leadership contest in the school.

Q Were you aware of any similar speeches to yours that were given previously?

A Yes, there was a speech that had been given the previous year by a student named Rick Renau and it used sexual innuendo and I was aware of that speech and to the best (p. 52) of my knowledge he had not been punished.

Q What did your knowledge of his speech suggest to you regarding the propriety of your speech?

A I even thought about it before I gave the speech and one of the key things in my deciding to go ahead and give it was that a student had given a speech in which he had used four letter words and he hadn't been punished. He had simply, you know, been called to the office and said, gosh, that wasn't too neat and I decided that there was nothing wrong with my speech and there was no patent words in it, so I was going to go ahead and give it, because he hadn't been punished.

Q We have learned so far that two teachers previewed your speech, Mrs. Hicks and Mr. DeHart, did any other teachers preview your speech before you gave it to the assembly?

A Shawn Madden did.

Q Did any of them demand that you not give the speech?

A No.

Q Did any of them suggest that it might be a violation of the school rules?

A No.

Q Who conducted the assembly at which you gave your speech?

A Matthew Taylor.

Q Did he have any difficulty maintaining order?

(p. 53) A No.

Q What happened after your speech?

A After my speech I went to sit down and my candidate got up and he spoke.

Q Was there any substantial delay between your speech and the following speech?

A No, it was about five or ten seconds, the same as every other speech where you walk and sit down and the other candidate comes up.

Q Were you or was anyone at the assembly or soon thereafter accosted or assaulted?

A No, not to the best of my knowledge.

Q Following your speech, did anyone ask you for a copy of it?

A Yes.

Q Who was that?

A Lee Morrison.

Q Did you candidate win the election?

A Yes.

Q Have you, during the last two years criticized the administration?

A Yes.

Q In what form?

A Well, I have done it through editorials in the newspaper, but I have also done it verbally. I have done it

• • • • •

TESTIMONY OF MATT FRASER (Continued)

(p. 58) Q (By Mr. Haley) Matt, how many letters were you given?

A Five that morning.

Q Did any of these letters accuse you of disrupting the assembly or causing other students to disrupt the assembly?

A No.

Q Did any of these letters accuse you of causing disruption the following day?

A No.

Q By giving your speech?

A No.

Q Were you allowed to respond to the charges contained in the letters?

A Yes.

Q What punishment was then imposed?

A I was suspended for three days effective immediately and I was told that my name would be removed from the graduation speaker ballot.

Q Did you then leave the school?

A Yes.

Q When you were being considered for a graduation speaker were you given a graduation speaker application form?

A Yes.

Mr. Haley: I believe you have a copy, your (p. 59) Honor and I gave a copy to opposing counsel.

Can we stipulate, counsel, that this is a genuine copy of the graduation speaker application form?

Mr. Coats: Yes.

Mr. Haley: Thank you.

Q (By Mr. Haley) Are the criteria stated in this form the criteria that were used for selecting graduation speakers?

A I can't see the form that you are holding, but yes, there was a graduation form that stipulates the three different criteria.

Q Were you approved as graduation speaker under these criteria?

A Yes, I was approved to be on the ballot to be a graduation speaker.

Q By whom were you approved?

A There was a selection committee and they said it was okay.

Q When did they tell you that you were approved?

A They didn't signify to any individual. I was told by Mr. Rich and Mrs. Christie Engle and Mr. Rich called me in for a conference on the morning of the 26th.

Q Was that the same day that you then gave your speech?

A Yes, about three hours earlier and they told me that they had reviewed my history and I would be allowed to (p. 60) be on the ballot for graduation speaker.

Q How many days of school did you miss?

A Two days.

Q How does the suspension affect your role in the Honor Society?

A I have been informed by the advisor that if the suspension is upheld in court that I will be removed from the Honor Society.

Q Has the suspension and the thought of being kicked out of the Honor Society and the thought of not being allowed to speak at graduation caused you any mental anguish?

A Yes, some.

Mr. Haley: That is all I have.

The Court: Any redirect?

Redirect Examination

By Mr. Coats:

Q At the try outs for graduation speaker, did you give the speech that you intended to give at graduation?

A No.

Q You said that there was a conference in the principal's office the morning of the 26th before the assembly?

A Correct.

Q It was about the graduation speech?

(p. 61) A Right.

Q Who was present at that conference?

A Christie Engle and Dave Rich.

Q What was said?

A Well they told me that they were concerned about whether or not I should be allowed to be on the ballot for graduation speaker. They said that they had heard from a source or two, I am not sure whether they said various sources or not, but they said that they had heard from at least one source that it was possible that I would not give that same graduation speech at graduation and I informed them that was correct, that I would not give that same speech and I told them whatever I would give at graduation would be appropriate for the occasion, although it was not the same speech and they said, that was acceptable and I would be allowed to go on the ballot.

Q Did you believe your speech at the assembly was appropriate, the April 26th assembly?

A I think it was appropriate for a political assembly.

Q You indicated that for the last two years you have been critical of the administration in both a column in the newspaper and verbally, is that correct?

A That is correct.

Q During that time have you ever been disciplined or otherwise adversely affected by the administration?

(p. 62) A No, I have been called in for conferences, one conference in particular, but I haven't been disciplined.

Q What conference was that?

A I had one with Mr. Lee Morrison after there was a matter concerning whether or not there had been a misappropriation of \$50.00 from Associated Student Body

funds or something for which the school should not be paying, which was to paint the local bridge with a Bethel insignia and I had accused him both in the newspaper and in front of several students. I produced a document with his signature on it to show that it was to buy the paint to be used to paint the bridge, so he called me in for a conference and talked about the situation.

Q When did that occur?

A Sometime last year towards the end of the year.

Q Do you recall, was Mr. Morrison critical of you over that?

A I don't know one way or the other.

Q Did you ever ask Mr. Morrison for a recommendation?

A I did.

Q Why did you ask Mr. Morrison?

A Because I had been talking to him about application processing and he informed me he would be able to give me a favorable recommendation, so I said, good.

Q To your knowledge, did he in fact write a favorable (p. 63) recommendation?

A I didn't see the recommendation that he wrote. I saw one this morning and that could be the recommendation that he wrote, which I would consider to be favorable.

Q Do you have any instances where Mr. Morrison has retaliated against you for any of these articles or any of the talks that you have given?

A Retaliated, no.

Q Any instances where Ms. Engle has retaliated against you or disciplined you for any of your newspaper articles?

A No.

Q What about Mr. Rich?

A No, I would say up to this incident.

Q Up to this incident?

A Right.

Q You indicated that you had a conference with Ms. Engle over the disciplinary action that took place?

A Correct.

Q In fact, she imposed the discipline?

A Correct.

Q I want to hand you a document, which purports to be a disciplinary notice, can you identify that for me, please?

A That is the discipline form that was given to me.

Q I have had this marked as Exhibit A and that is in fact (p. 64) the disciplinary notice that was given to you?

A That is correct.

Mr. Coats: I move for the admission of Exhibit A.

Mr. Haley: No objection.

The Court: Admitted.

(Defendant's Exhibit A admitted into evidence)

Q (By Mr. Coats) In fact it is disruptive behavior?

A It says that on it, yes.

Q Now after Ms. Engle's conference you were aware that you had to appeal to a district administrator, to the Central Office Administrator?

A Well, there was two different appeals. I appealed immediately, I wanted to know who in the building to appeal to, so Mrs. Engle told me the principal wasn't in, so I appealed to her.

Q You had a choice of appealing to her or Mr. Morrison?

A I was not informed of that choice.

Q Did you have the choice of waiting for Mr. Rich?

A I wanted to appeal immediately so I could get back into school that day.

Q Subsequently did you have an appeal to Mr. Alexander, the District Administrator?

A That is correct.

(p. 65) Q You had this notice indicating disruptive behavior at that time?

A That is correct.

Q I am handing you what has been marked as Exhibit B and I ask you to identify that for me, please?

A That is the school handbook which describes the procedures of the school.

Q Had you been given a copy of that?

A I hadn't in the past, but I did ask for one upon being disciplined.

Q Did you receive it?

A Yes.

Q Is that generally available in the school?

A Yes.

Mr. Coats: I move for the admission of Exhibit B.

Mr. Haley: Counsel for the plaintiff does not object.

The Court: Admitted.

(Defendant's Exhibit B admitted into evidence)

Mr. Coats: I have no further questions.

Mr. Haley: I have nothing further.

The Court: Mr. Fraser, were you subsequently elected by the student body to be a commencement speaker?

(p. 66) The Witness: Yes.

The Court: When was that?

The Witness: The date escapes me, it was in the last week and a half, two weeks.

The Court: Do you know, counsel?

Mr. Haley: Yes, it was May the 19th.

The Court: Any objection to that, May 19th?

Mr. Coats: I don't know the date. That is close enough.

The Court: Any questions you want to propound to this witness, Mr. Coats.

Mr. Coats: No, your Honor.

Mr. Haley: No, your Honor.

The Court: You may step down. Anything further?

Mr. Coats: Yes, Steve DeHart, please.

STEVEN DeHART, having been first duly sworn upon oath by the Clerk, testified as follows:

Direct Examination

By Mr. Coats:

Q State your full name, please?

A Steven Darryl DeHart.

Q By whom are you employed?

A Bethel School District.

Q In what capacity?

(p. 67) A Social Studies teacher.

Q Do you know Matt Fraser?

A Very well.

Q Did he preview his speech that he gave on April 26th with you?

A Yes, he did.

Q What was the context of that?

A He came into my room ten to fifteen minutes before the assembly. At that particular point I was helping another student who had been having trouble in class. He asked if I would like to hear his speech and I said I would. I excused myself from the student I was helping and then he read his planned speech to me.

Q What was your response?

A My response at that time was that I told Matt that this would indeed cause problems in that it would raise eyebrows.

Q Did you say anything else?

A I told him, or at least as I thought, I was trying to describe to him that there would probably be negative consequences.

Q Did you describe any of those negative consequences?

A Not in detail. I thought that I implied that there might be severe consequences, but more so, I think, I was thinking in terms to his last few weeks as a senior (p. 68) at Bethel High School.

Q Did you mention a suspension to him?

A I think that I thought I implied that I did, but I did not use it in so many words, no.

Q Could you explain what you said to imply it?

A Well, I think by saying that it could cause problems and raise eyebrows I also realized that the speech was indeed ambiguous, could be interpreted a number of ways, so rather than debate with Matt on morality profanity in it I thought it might be best to just point out or at least try to reason that it could indeed cause problems as far as his remaining few weeks at the school. I did not know what the consequences could be.

Mr. Coats: That is all the questions I have.

The Court: Cross-examination?

Cross-Examination

By Mr. Haley:

Q Mr. DeHart, did you state to Matt Fraser that delivery of the speech might violate a school rule or subject him to punishment?

A No, I did not.

Q Did you alert the administration that Matt Fraser intended to give this speech?

A No, I did not.

(p. 69) Q Following the delivery of the speech did you hear assistant principal Morrison make any comments about the speech or Matt Fraser?

A Well, concerning Matt first. After the assembly Matt returned to my room. At that point he told me that he had delivered the speech, but that he believed that he was in trouble. The reason for that is that he had been stopped in the hall and I think escorted or he had gone by his own free will to the office and there he had gone through a preliminary hearing or he had been confronted with those teachers who had found it to be offensive.

Later on that evening around 6:00 o'clock in the evening I received a phone call from our assistant principal Lee Morrison concerning what our conversation, Matt's conversation and mine, had been preceding the speech as well as afterward.

Q Did assistant principal Morrison make any comments to you following the speech which suggested that Matt Fraser should not be allowed to get away with this one?

A He said at the end of our conversation that the behavior was inappropriate and they could not let this go. As far as directed toward Matt Fraser, no. In other words, it was in not some sort of indictive type of response, no.

Q Did assistant principal Morrison ask you to prepare a (p. 70) statement regarding your discussion of the speech with Matt Fraser?

A Yes, he did and to have it ready the next morning.

Mr. Haley: Thank you, that is all I have.

The Court: Redirect examination?

Mr. Coats: I have no questions.

The Court: You may step down. Your next witness.

Mr. Coats: We will call Mrs. Ingle.

The Court: The clerk reminds me we should take a break, we will take a ten minute recess.

(Recess)

The Court: Be seated, please. Your next witness.

Mr. Coats: Mrs. Ingle, please.

CHRISTIE INGLE, having been first duly sworn upon oath by the Clerk, testified as follows:

Direct Examination

By Mr. Coats:

Q Would you state your name, please?

A Christie Blair Ingle.

Q By whom are you employed?

A The Bethel School District.

Q In what capacity?

(p. 71) A Assistant principal of Bethel High School.

Q How long have you held that position?

A About four and a half years.

Q How long have you been involved in education over all?

A Eleven years, I think.

Q Do you know Matt Fraser?

A Yes, I do. Not well, not personally, but I know him.

Q Prior to April 26th the day of this assembly how many contacts did you have with Mr. Fraser?

A Prior to that date the only one that I can really remember is that he was a candidate for student body treasurer last year and our student body treasurer is elected by an interview team and I was a member of that interview team.

Q Had you had any disciplinary actions with him?

A No.

Q Did you attend the assembly on April 26th?

A No, I did not.

Q When is the first that you learned about Matt Fraser's speech at that assembly?

A About a half hour following the assembly. I had been out in the building walking around checking on things

and when I returned to the office that he had given a speech and from the information we had at this point it was inappropriate and disruptive.

(p. 72) Q When he came back to the office who advised you of the speech?

A I believe it was Mr. Rich.

Q Who is Mr. Rich?

A Mr. Rich is the principal of the high school.

Q Do you recall what Mr. Rich said to you?

A I am sorry, I don't remember his exact words. I just remember that he said something about the speech and that Mr. Rich was going to be out of town the next day, so he would not be able to deal with a disciplinary matter and he and Mr. Morrison and I sat down together and Mr. Rich said we don't have all the facts, but between now and tomorrow morning when Matt comes in with his parents he kind of charged me with trying to, and Mr. Morrison, to get as many of the facts that we could so we could find out exactly what had occurred.

Q What did you do then to gain these facts?

A Mr. Morrison and I talked with a variety of people. That afternoon I talked with Mrs. Hicks, I believe and I don't remember if I talked with anybody else that afternoon. Mr. McCutcheon I talked with that afternoon.

The next morning I listened to a conversation between Mr. Morrison and Mr. Madden, I don't believe I entered into the conversation. I talked with Mr. Ken Salmons, a teacher. I talked with Mr. Steve DeHart and (p. 73) with Mrs. Tona Nape.

Q Were these teachers—

A These are all teachers who were at the assembly or who had some knowledge of the speech.

Q Did you meet with Mr. Fraser?

A Yes, I did.

Q When did that take place?

A To the best of my recollection approximately 7:30. Mr. Rich had told me that he had told Matt to come into the office before school and bring his parents and as soon as I got to work that morning I had been busy trying to talk to various staff members and I remember particularly looking at the clock and seeing it was 7:15 and I rushed over to the office, they have these windows that you can look into the main office from the hall to see if Matt and his parents were sitting out in the office and they were not and then the tardy bell rang at 7:20 and he still wasn't there and about 7:25 I saw him down the hall and he had not reported to the office, so I sent for him and he came to the office.

Q Who was present when you met with him?

A Mr. Morrison was there.

Q Where did the meeting take place?

A In my office.

Q What was discussed at that meeting?

(p. 74) A Well, Matt came into the office and I don't honestly recall saying anything to him. I may have, but he immediately began to talk about his speech and to defend his speech. He told me that he thought it was appro-

priate, that it was not obscene, that if there was anything inappropriate about it that was the fault of listeners, not his fault. He told me that he had been contacted with an attorney and he had been advised by his attorney that his speech was not inappropriate and not obscene and that it would be inappropriate for me to suspend him according to his attorney.

Q What was your response?

A I told that I believed that the speech, based on the information that I had that I believe his speech was inappropriate and he produced a copy of the speech at that time and I read the speech.

Q Did you discuss it further with him?

A He asked me—well, first of all, he said before we got into a discussion about the speech, I understand that some teachers are making statements about me, I would like copies of those statements, could I have copies of them and I said absolutely, you certainly can and I believe it was Mr. Morrison then that took the copies of those statements and had copies made for Matt.

Then I assume, I usually do, but I can't swear to (p. 75) it, I asked him, I asked him, you know, if he had anything more to say about the speech and his information that he wanted to share with me about the speech seemed to be exhausted and I said, Matt, I am going to suspend you then for disruptive behavior and he asked me what is disruptive and I said, well, my understanding from everybody I talked to is that you gave a speech that the students were hooting and hollering and there is no question in my mind and in the minds of the people who were there that the speech was obscene. It doesn't make any sense if it

is in any other way, it doesn't make sense in support of a candidate, it doesn't make sense unless you take it in a sexual context.

Q That was the disruptive conduct that you discussed with him?

A To that extent it was, yes.

Q You prepared, handing you what has been marked as Exhibit A, in fact you delivered that notice to him indicating disruptive behavior?

A Yes, I did.

Q Referring you to what is Exhibit B, can you indicate on what page the rule is that you feel is violated?

A On page eight, District Offenses, disruptive behavior, conduct which materially and substantially interferes with the educational process is prohibited, including (p. 76) the use of obscene, profane language and gestures and on page ten there is another paragraph about disruption. "Disruption of the educational process will not be permitted. The educational process is defined as all activities carried out during the school day and any special educational program authorized by the district either during the day or at some other time is the responsibility of the principal or the designee to determine whether or not it is a disruption in any given situation."

Q In determining disruptive conduct at a political assembly like this, sometimes the students yell out and say, speech, speech and other things when people are speaking?

A Umm hum.

Q How did Matt Fraser's speech vary from the usual?

A My interpretation of this particular rule is that it says very specifically that obscene and profane language and gestures is inappropriate in our school. That is one aspect of it. The other aspect is that the speech as we heard on the tape was at a particular point which sexual references were made. The students were hollering to the point where the other parts of the speech, his voice faded out and you couldn't hear them.

Q You had indicated that you found the speech to be obscene and profane and yet there are no four letter words (p. 77) in the speech, why did you find it obscene and profane?

A Because the whole context of the speech suggests male sexual acts.

Q Has Matt Fraser written any columns in the newspaper or are you aware of any talks he has given or discussions he has had where he has been critical of you?

A I can't honestly remember that he used my name in the newspaper, but he may very well have. I don't know of any talks he has given. I don't have a lot of involvement with student government and that is one area where he has given his more critical talks.

Q Did his criticism of the administration or his prior newspaper articles or discussions have anything to do with your decision in this matter?

A No.

Q There has been reference to a student essay last year that they are saying was obscene, were you aware of that essay?

A I have not read the Pentason (phonetic). That is the booklet that that particular essay appeared in.

Q What is the Pentason?

A It is a literary magazine that is published by our students.

Q There was reference to another speech last year that had a four letter word in it, were you aware of that?

(p. 78) A When it was brought to my attention I had a vague recollection of the incident occurring. I was not involved in the discipline, but I had a recollection of a meeting with the youngster's parents and Mr. Morrison, I believe.

Q In implementing the disciplinary action did you attempt to follow the usual guidelines and procedures of Bethel High School?

A Yes, absolutely.

Q Are you in charge of selecting the graduation speakers or the process for doing that?

A Yes.

Q What is that process?

A We have a graduation committee and to some extent it was the prerogative of the students, there are 14 students on the graduation committee. To determine the selection process the students had a choice of either forming a selection committee that in itself would select the graduation speaker or forming a screening committee which would hear the speeches the students proposed to give at graduation and then put the name before the entire senior class to vote those speakers they thought would be appropriate for graduation.

The reason for that process of having some sort of screening process was that in a couple of occasions in (p. 79) the past several years ago speeches were given at graduation which we didn't feel showed the students giving the speech to their best advantage or Bethel High School to its best advantage and we have a real concern that the students at graduation have a ceremony that they and their parents are proud of and can remember through the rest of their lives with pride, so we do have the screening process for the selection of the speakers.

This year's graduation committee chose to act as a screening committee and then to put the name before the students for voting.

Q Did Matt Fraser participate in this process?

A Yes, he did.

Q Was he on the initial list?

A Yes.

Q When the actual election was held he was stricken from the ballot?

A Yes.

Q What was the result of the election?

A I can't remember the exact numbers, but the student who received the most votes, I believe, it is 35 votes and Matt Fraser received 31 write in votes.

Q How many students are in the senior class?

A They were going to graduate 270.

Mr. Coats: I have no further questions.

(p. 80) The Court: Cross-examination.

Cross-Examination

By Mr. Haley :

Q Mrs. Ingle, how many graduation speakers were to be selected on the ballot taken May 19th?

A Three.

Q Were those three to be the three students who received the highest number of votes?

A Yes.

Q In the write in votes did Matt Fraser receive the second highest number of votes?

A Yes, he did.

Mr. Haley : Thank you, that is all I have.

The Court : Any redirect, counsel.

Mr. Coats : No.

The Court : Ms. Ingle, calling your attention to Defendant's Exhibit B, I think you have it in your possession, the rules of Bethel School District?

A Yes.

Q Can you point to the rule in there that authorizes you, or did you take the plaintiff's name off the ballot, or did Mr. Morrison do it?

A I believe that Mr. Rich would be the person who did it.

Q You were the person that imposed discipline didn't you?

(p. 81) A Yes, I did.

Q You didn't take his name off the ballot?

A It was a decision just as the discipline was a decision that we reached in conference. The decision to remove the name from the ballot was the decision that we made.

Q In relation to the time that you said that you suspended him for three days?

A Yes.

Q In relation to that time, do you recall that?

A Yes.

Q When was his name taken off the ballot?

A Well, I had my secretary to type up the ballot I believe on May 18th, I am not positive of the date and at that time I told her that she was to type it up without his name on the ballot.

Q Where in the rules of the Bethel School District, Defendant's B, that authorized that additional punishment?

A I beg your pardon, sir?

Q Where in Defendant's B, which are the disciplinary rules of the Bethel School District, is the section that authorizes the subsequent or additional punishment after the suspension?

A There is nothing in the student handbook that speaks to specific punishment other than it says, I can't remember, (p. 82) but in the student handbook the references to punishment say up to and including suspension and expulsion.

Q That is what I am trying to find, is there something in those rules that authorized the committee, which included yourself, to go beyond the suspension and take his name off of the ballot, isn't that punishment?

A Yes, we believe it is our prerogative to do that, just as it is our prerogative to call a parent conference, to assign a student to detention, to assign a student to picking up litter around the school building.

The Court: You answered the question, any further questions?

Mr. Coats: I have no further questions.

Mr. Haley: Yes, I have another question.

Q (By Mr. Haley) You say the decision for discipline was made in a conference with Mr. Rich and Mr. Morrison, is that correct?

A Yes.

Q Did that conference take place before you gave Matt Fraser copies of the five letters?

A The parameters that I might consider when imposing discipline took place, yes, on the 26th.

Q So your answer is yes?

A Yes.

* * * * *

TESTIMONY OF LEE MORRISON

Cross-Examination by Mr. Haley

* * * * *

(p. 92) Q Do you ever, as a representative of the administration, act as the voice of the administration in disciplining seniors?

A That could happen. If I am the only administrator in the building or if I happened to deal with a student who was involved in some kind of an act and Mrs. Ingle was not there, it is something that needs to be dealt with immediately, yes, I would on occasion deal with a senior.

Q So you are saying that the only reason it was switched from yourself to Mrs. Ingle who acted on behalf of the administration in carrying out the plans of the disciplinary action was simply because she is the person who deals with seniors?

A No, Mr. Rich told her to and she is the person who normally deals with seniors, yes.

Mr. Haley: I have no further questions.

The Court: Any redirect?

Mr. Coats: I have no further questions.

The Court: Mr. Morrison, is the word (p. 93) inappropriate synonymous with disruptive to you?

The Witness: In regards to the school?

The Court: Yes.

The Witness: Yes, it is.

The Court: So they mean the same thing to you?

The Witness: No, it is synonymous with the school.

The Court: No, I have heard all morning the inappropriate, does that come out disruptive to you?

The Witness: Not necessarily.

The Court: How about non-conforming, is that disruptive?

The Witness: No, not necessarily.

The Court: How can a lay person or an outside person tell what is disruptive at Bethel High School?

The Witness: We don't expect them to.

The Court: That is the answer you gave. Any further questions?

Mr. Haley: No, your Honor.

Mr. Coats: Wait a second, I have a further question.

Redirect Examination

By Mr. Coats:

Q In determining disruptive behavior in your view, do the (p. 94) students understand what that conduct is at Bethel High School?

A Based upon the student handbook I would believe that they would, yes.

Mr. Coats: I have no further questions.

The Court: You may be excused.

Mr. Coats: I will call

RANDETTA STEWART, having been first duly sworn upon oath by the Clerk, testified as follows:

Direct Examination

By Mr. Coats:

Q Would you state your name, please?

A Randetta Delancey Stewart.

Q Would you spell your last name, please?

A S-t-e-w-a-r-t.

Q By whom are you employed?

A The Tacoma Public Schools.

Q For how long have you been employed by Tacoma Public Schools?

A A little over three years.

Q In what capacity are you employed?

A Assistant Superintendent of Schools.

Q What are your duties as Assistant Superintendent?

A They are various. The scope of my responsibilities cover community affairs, contract appliance, affirmative (p. 95) action, special harassment, Title 9, which is sex equity, Title 4, race desegregation.

Q By whom were you employed prior to coming to Tacoma?

A The Evergreen State College at Olympia. Prior to that I was a faculty member at Central Washington State College at Ellensburg.

Q Did you have counseling duties when you were at Central Washington University?

A I did.

Q What type of counseling duties did you have at Central Washington University?

A Personal counseling with students.

Q For how long did you have those duties?

A Probably for about nine years.

Q What is your training for that type of activity?

A I have a degree in Human Relations and Psychology.

Q Do you have involvement with the sex equity and Title 9 program in Tacoma Public Schools?

A Yes, I do.

Q What is that involvement?

A That involves insuring that girls and boys are treated with equity in all phases of our educational system in terms of what is being taught in our classrooms.

Q I asked you to review a speech, a written copy of a speech given by Matt Fraser, did you do that?

(p. 96) A Yes, I did.

Q I explained to you that that speech was given at an assembly in Bethel School District?

A That is correct.

Q Where high school students were present?

A Correct.

Q When you reviewed this speech did you draw any conclusions from it?

A I did.

Q What conclusions did you draw?

A There were several. One, I felt that it had sexual innuendo. It was double talk. I felt that it was sexually harrassing for me as a female and possibly the same for a male. I felt that it was a put down to our female students and in the innuendo and that I felt came from the speech, women could feel as if they were being put down or spoken to in terms of a sexual object.

Q In terms of sexual harassment, why did you conclude that it was sexual harassing?

A In my opinion this kind of thing serves to disrupt students in a way of which the whole learning process is interrupted and I feel that it is the responsibility within the school district to insure that the environment is free of this kind of thing whereby students are able to learn at their highest level of productivity.

(p. 97) Q How would you anticipate that the learning process would be interrupted?

A Well, if you hear this, after hearing this and discussion takes place I think it detracts from whatever is being taught in the classroom. Rather than go to a class to hear and learn what is being taught this could certainly be a point of discussion and I think it would also put students off his person.

Q Why would it put them off his person?

A I think it invades sin as persons, it invades their being, I guess that is the best way I can put it.

Q You indicated it was a put down to women, how do you think it is a put down to women?

A Well, when I read he is firm in his pants, I look at that as having more than innuendo. I think of that in terms of an erection of a male, a sexual prowess of a male. The macho, I guess that is another way to put it. It is offensive, it is very offensive.

Q What response would you anticipate from a high school audience to this type of speech?

A I would anticipate a lot of parents calling my office being very angry. The principal not being able to carry out his responsibility in a building, because the parents as well as the students would be up in arms of this kind of thing having occurred in an assembly.

(p. 98) Q You indicated that you are involved in sex equity program in Tacoma Schools?

A Umm humm.

Q What impact do you feel that a speech like this would have on a sex equity program?

A Well since I handle a lot of grievances I would be inundated with grievances in terms of mothers asking why we would permit this kind of thing to take place in the school district at any level.

Q Would you anticipate any effect on the learning atmosphere itself?

A I do, because I feel sometimes in a student's life, and I am not sure what that span of age would look like, every time I would hear this or it would come back to mind it would incite to me as a woman that I was less than a being. Someone is talking about, as I read it, a form of sexual intercourse taking place or a sexual act occurring.

Mr. Coats: I have nothing further.

The Court: Cross-examination?

Cross-Examination

By Mr. Haley:

Q Mrs. Stewart, did the speech describe Matt Fraser's candidate?

(p. 99) A I don't think it did.

Q Did the speech refer to Matt Fraser's candidate?

A His name was given in the speech, yes.

Q Were any of his characteristics described?

A It says that he was a male, a man.

Q You say that there is sexual innuendo in the speech, is that correct?

A Yes, I did say that I feel that strongly.

Q Does that sexual innuendo refer to any characteristics of Matt Fraser's candidate?

A I don't believe it does.

Q What do you believe that sexual innuendo is referring to?

A I think it is referring to a sexual act occurring, a sexual act being described in the form of innuendo.

Q But that description does not refer in a sexual innuendo to Matt Fraser's candidate?

A I don't believe so.

Q Mrs. Stewart, are you familiar with the topics for education in the schools?

A I like to think that I am.

Q Do the schools have a duty to teach about the U. S. Constitution?

A I believe we do.

Mr. Haley: That is all.

(p. 100) The Court: Mr. Coats?

Mr. Coats: I have no further questions.

The Court: Mrs. Stewart, if Matt Fraser had got up at that time and place in Bethel High School and looked over the crowd and said there is one more male in here, instead of female, and said, my candidate is against women holding public office. I do not believe and my candidate does not believe in females being public office holders and that includes Bethel High School, would that be disruptive?

The Witness: It could be.

The Court: Anything could be disruptive. How about if the speaker was a five foot tall blue eyed blonde with a sweater too small and blue jeans too small just stood there and said, vote for me you all, would that be disruptive?

The Witness: It could be.

The Court: And suggestive?

The Witness: It could be.

The Court: I have no further questions. Any further questions of this witness?

Mr. Coats: I have no further questions.

Mr. Haley: I have no further questions.

The Court: You may be excused.

Mr. Coats: I will call Mr. Rich.

(p. 101) DAVID CLARENCE RICH, having been first duly sworn upon oath by the Clerk, testified as follows:

Direct Examination

By Mr. Coats:

Q Would you state your full name and spell your last name, please?

A David Clarence Rich, R-i-e-h.

Q By whom are you employed?

A Bethel School District.

Q In what capacity?

A Principal of Bethel High School.

Q How long have you been principal?

A Seven years.

Q Were you present at this assembly on April 26th?

A I was not.

Q When was the first that you heard about the speech at that assembly?

A When I returned to the building about 2:30 when a staff member approached me and told me the speech had taken place.

Q What did you do at that time?

A I asked Mr. Morrison and Mrs. Ingle to get together with me so we could find out what had happened, what the speech was and if there should be any consequences.

Q What occurred at that meeting?

(p. 102) A We in fact talked a little bit about the speech, the information that we had at that time we discussed. By 2:30 or 3:00 o'clock teachers were beginning to leave the building and there were no students around, so we talked about what was supposedly in the speech. We didn't have a copy of it and since I was going to be out of the building the next day we talked about possible consequences depending upon what in fact was the topic of the speech.

Q Who did you assign to handle this problem?

A Christie Ingle.

Q Why did you assign her?

A For two reasons, one, she handles senior discipline and secondly, she is senior assistant principal.

Q Did you give any instructions as to what the penalty should be for this matter?

A We talked about some possibilities, but I indicated to Christie that since she hadn't had an opportunity to talk to the teachers that were present or students that were present, or to Matt, that she would have to weigh the circumstances and come to a decision.

Q Mr. Fraser has written various columns and made various statements critical of the administration, is that correct?

A Some people would say that, yes.

(p. 103) Q Have you found them to be very critical?

A Slightly critical.

Q Have you ever taken any disciplinary action for that?

A No, in fact I have admired the speeches and the challenging way that they have been written. I think I told Matt that.

Q Did those speeches or articles or any of his part of conduct weigh in the determination of what discipline would be given in this instance?

A Absolutely none.

Q Did you have occasion to meet with Mr. Fraser on April 26th the day of the speech?

A Yes, I did.

Q When did that meeting take place?

A That meeting took place at sometime in the morning.

Q What was discussed at that meeting?

A It had to do with the speeches that were given for graduation, the try out speeches and I had been told by a couple of teachers that perhaps Matt was just playing games as far as the speech, that he had just written it a few minutes or within an hour of when he gave it and it was not even close to the speech that he would be giving at graduation.

Q What did you discuss with Matt Fraser about that?

A I sat down with Mrs. Ingle and Matt and we talked about (p. 104) 40 minutes about graduation, I guess and the fact that it was important to have an appropriate ceremony. We talked a little bit about the fact, I think, that Matt felt that his speech was appropriate—no, this was before we got there. We talked about the importance of a good speech at graduation.

Q What was the result of that conference?

A As I recall, the last words were me saying to Matt, that I have to trust you Matt, that you will do the right thing and get the job done.

Q You weren't there during the assembly?

A No.

Q After the discipline was imposed, there was a three day suspension and also taking him off the list for a potential graduation speaker, is that correct?

A Yes.

Q Have you reviewed that disciplinary action?

A I reviewed that disciplinary action and Matt came in on the second day of the suspension and we talked at that time for probably an hour or more and I then stayed the final day of suspension, the third day of the short term suspension.

What was discussed at that time?

A I think generally the whole concept of the speech and the implications that it had. I think in probably an (p. 105) hour and a half we talked about implication for students, for staff, generally discussed the whole issue.

Q You support both the suspension and keeping him from being a graduation speaker?

A Yes.

Q Why do you support keeping him from being a graduation speaker?

A It is very disturbing to me to have to take that position, because I feel that being selected as the graduation speaker is important, but I told Matt that what he and I believe to be obscene is apparently very much different. What he and I believe to be an appropriate speech in a student body assembly is not in agreement and I indicated why should I think that we would be in agreement for a graduation speech.

Q You referred to his speech as being obscene, I want you to have in front of you a copy of what we agreed was his speech, if you would tell us why you find that to be in violation of the school disruptive conduct rule?

The Court: How many times do we repeat this, counsel? We have got seven witnesses here now and all say the same thing. Is this witness going to add something different or just his position?

Mr. Coats: He is going to offer his position.

The Court: Why didn't you put him on first (p. 106) then, his position, I assume, is the school's position, so why did you need two other vice principals.

Mr. Coats: I think they participated in the disciplinary process.

The Court: Isn't he the captain of the ship?

Mr. Coats: Yes, he is.

The Court: Well, accumulation and reptition isn't going to change anything in this case. That is all I am suggesting to you.

Mr. Coats: It appears to me as we have gone through this that one of the key issues concerns disruptive conduct.

The Court: Who is responsible?

Mr. Coats: He is the chief administrative officer of Bethel High School.

The Court: Why didn't you call him first and we would have had it all over with.

Mr. Coats: Well, I like to call witnesses the other way.

The Court: Go ahead.

Q (By Mr. Coats) The question is how does this violate disruptive conduct rule at Bethel High School?

A As far as I am concerned the speech is obscene. I think that vast numbers of our students feel it is that way, our staff obviously feels it is obscene, since they have (p. 107) signed a statement as such.

Communications that I have had both after this and in the past in my tenure in the school district indicates to me very clearly that the community parents would generally feel it was obscene. There is no question in my mind that it was given because of its obscenity, that the candidate Jeff Kuhlman could have stood on his own as far as being elected without even a speaker.

Mr. Coats: That is all the questions I have.

The Court: Cross-examination.

Cross-Examination

By Mr. Haley:

Q Mr. Rich, can you tell me the figure or a typical annual salary for a highly experienced teacher in your high school?

A \$25,000.00.

Q How many school days are there in a school year?

A 180 school days.

Q Are teachers in your school required to report violations of school rules?

A They have some parameters, some judgment to use in this.

Q Do you ask them in general to report violations of school rules?

(p. 108) A I ask them to use their judgment as far as the seriousness and the nature of the violation.

Q If they say that a violation of the school rules is about to take place, do you ask them to take some action?

A It depends upon the seriousness. They are asked to step in and deal with things as much as possible. We don't ask them to report every single item that they see.

Q If they could very easily avert a violation of the school rules before it happened, do you ask them to do so?

A Yes.

Q Why did you not stay the remainder of the second day of suspension pending appeal when you stayed the third day of suspension pending appeal?

A Only because when our conversation finished it was about 12:00 o'clock. Our school only runs to 1:55.

Q Why did you not allow him to return to school for the remainder of that day?

A I choose not to, although I did indicate that he could go speak to a teacher who I think must have been on conference period at that time.

Q So why did you choose not to allow him to return to school for the remainder of that day?

A Because I chose to uphold the suspension through the second day, because the second day was almost over (p. 109) anyhow.

Q Why did you differentiate between the remainder of the second day and the third day?

A Other than I reduced the suspension is the only thing I can say and that is when I chose to do that. I didn't see a significant advantage or disadvantage for Matt going back to school and being at school for an hour and a half.

Q Did you tell me on the telephone that you didn't want Matt to be in school the rest of that day because you expected student protest in opposition to the punishment imposed on Matt and you didn't want him to participate in the student protest?

A I don't recall that conversation.

Mr. Haley: I have no further questions.

The Court: Any redirect?

Redirect Examination

By Mr. Coats:

Q Did the student protest on the second day have anything to do with your judgment of not having him go back for the last hour and a half?

A. No.

Mr. Coats: That is all the questions I have.

The Court: Recross.

(p. 110) Mr. Haley: I have no recross.

The Court: Mr. Rich, what is an appropriate graduation speech that would be agreeable to you, sir?

The Witness: I think almost any graduation speech would be appropriate as far as I am concerned. I don't have any difficulty with graduation speeches or speeches of a political or controversial nature, but a speech at graduation or a speech at an assembly to which I believe, and I think that my experience and contacts support that, that I believe will be as upsetting and create disturbances amongst students, staff and community members then I believe that I have an obligation to be involved.

The Court: Are you familiar, sir, with the anti-Vietnamese speeches in the high schools and colleges in the late 60's and early 70's?

The Witness: Yes, I am.

The Court: Do you know that those were upheld as freedom of speech by the United States Supreme Court?

The Witness: I agree.

The Court: Wasn't that disturbance?

The Witness: I don't know, I wasn't involved.

The Court: You know the situation I am talking about?

The Witness: Yes.

(p. 111) The Court: Didn't that disagree with the position taken by the United States, surely that would cause disturbance, wouldn't it?

The Witness: I would assume it would, yes.

The Court: In your opinion, sir, is the word inappropriate synonymous with disturbance?

The Witness: It can be.

The Court: Why, what in the rules of the Bethel High School interprets that or defines it so that someone unfamiliar with it could have some reasonable idea as to clarity of the rules that I am violating?

The Witness: I would like to answer if I could this way. It is impossible for us in a student handbook to identify all of the violations. We can't cover all of the bases, all of the things that students could possibly do, so there are some areas that are left to some judgment and we have to make judgment calls every day. We don't have a rule that prohibits a student from riding down the hall on a motorcycle, but I hope we have the authority to stop them from doing that.

The Court: That is conduct.

The Witness: That is right, or for throwing things in the lunchroom or perhaps some other kinds of things that are disruptive to kids there and I guess what I am saying is that we don't have regulations to (p. 112) cover every single kind of an instance that might occur.

The Court: I guess is what makes lawsuits. All right, I have no further questions.

Mr. Coats: I have nothing further.

The Court: You may step down, sir.

Mr. Coats: I have no further witnesses, your Honor.

The Court: Do you want to argue?

Mr. Haley: Before we present argument I would like to present a couple of short witnesses.

The Court: What are they going to add to it?

Mr. Haley: I would like to—

The Court: Make an offer of proof.

Mr. Haley: I would like to present testimony regarding a speech that was given a year ago and the fact it is just as obscene and contains—

The Court: I will consider that. Anything else?

Mr. Haley: I would like to present testimony that the student behavior that Mr. McCutcheon described takes place in many of the places around the school besides this particular assembly on this particular day and many other situations.

I would like to present a very brief bit of rebuttal testimony regarding disruption.

* * * * *

PLAINTIFF'S EXHIBIT NO. 1
(5 letters concerning Fraser's speech)

4-26-83

On the afternoon of Tuesday, April 26, Matt Fraser came into my room and asked me to listen to the nominating statement he planned to deliver at that afternoon's ASB Elections Assembly. After excusing myself from another student, I agreed to listen to what he had written. At the conclusion of his statement I attempted to warn Matt that what he planned to say was going to cause problems and would certainly raise eyebrows of shock and surprise. I chose to avoid challenging Matt or passing judgment on the content of his statement's morality or possible profanity. I felt that besides being a matter of disputable or ambiguous interpretation that I might be able to successfully reason with Matt to avoid the certain negative consequences of delivering his planned statement altogether. Matt seemed determined to deliver this statement nonetheless, and after discussing his resolution for a few moments, he left. After the assembly Matt returned to my room and told me that he had read his planned nominating statement and that he believed he was in trouble.

Steven D. DeHart

4/27/83

4/26/83

When he gets a point he drives it home.
(Something about sticking it in the wall)
Doesn't work in spurts—(stays with it)
Even willing to bring things to a climax
The word "come"

Russ Olson

April 27, 1983

From: Dona L. Mantey, teacher

Re: Matt Fraser's speech at assembly on April 26,
1983

Matt Fraser spoke in front of the student body to introduce his candidate for the office of Vice President of the ASB. He started his speech by saying his candidate was "firm," which produced an immediate reaction from the student body (laughing; cheers etc).

Matt continued his speech by saying how "hard-driving" his candidate was. He said his candidate "would even go to the climax" for the students and "would come."

Each one of the statements in quotes was emphasized by significant pauses and use of voice inflection, to evidently assure that no one missed the meaning. The students, by their reactions (laughing; cheering; whistling) appeared to understand exactly what Matt's intent was in using these phrases.

My personal opinion is that the speech was inappropriate and was not what I would consider subtle sexual reference, but rather intentionally blatant.

There were more sexual references in his speech, but I cannot recall exactly what they were.

TO: Bethel High School Administration

FROM: Sean L. Madden, Language Arts Teacher

RE: Deposition re: Speech delivered by Matthew Fraser to Student Body, April 26, 1983.

DATE: April 27, 1983

Herein I will analyze the aforementioned communication incident with my observations as a professional communicator. I must preface the analysis with a summary of generally accepted principles of the process of communication: 1) Communication is a mutual responsibility of both sender and receiver; 2) All messages must be encoded and subsequently decoded, thus the probability of translation difficulty is significant; 3) Meaning exists only in minds not in fact; 4) The determinants of meaning are denotation, connotation, structure, and context.

Based on these principles, what I observed on 26 April, 1983, was Matt Fraser sending a message to a number of receivers. That message could be interpreted in multiple ways as evidenced by audience reaction. The denotation of each word delivered, however, could be interpreted as nothing other than acceptable. The structure of the message suggested nothing other than reference to positive character qualities of the candidate nominated by Mr. Fraser. The context was obviously one of politics, therefore, Mr. Fraser's words should have been construed to refer only to his candidates political characteristics. The problem arose in the area of connotation. To the teenage audience present, several words could be taken out of context to refer to sexual activity. This connotation was taken by several receivers of the message. Responsibility

for connotative interpretation must lie with the receiver by its very nature. My conclusion thus must be that the bulk of the students present and several faculty members must be held responsible.

Overall, nothing was said which could be in and of itself offensive.

To Whom It May Concern :

I did not attend the assembly on 4/26 but Matt allowed me to read his speech the following morning. I told him that I felt it was inappropriate for the situation. While I agreed that it was cleverly written, I told Matt that I felt the reason he was using this was because the student body would interpret the speech in its profane meaning.

Duane A. Little

4/27/83

PLAINTIFF'S EXHIBIT NO. 2
(decision of school district hearing officer)

CASE NO. 25, #1982-83

IN THE MATTER OF THE SHORT-TERM)
SUSPENSION AND DISCIPLINE OF:)
MATT FRASER)

This matter comes before Bruce Alexander, designated hearing officer for the Bethel School District, in response to Matt Fraser's grievance of a three-day suspension from Bethel High School and removal of his name from the list of candidates for graduation speaker. Although Matt Fraser, through his attorney, was advised that the District would provide a full hearing in this matter if requested, he has submitted his grievance in the form of a letter from his attorney, Mr. Haley, dated May 3, 1983. This matter has been determined on the following record:

1. The written copy of a speech delivered by Matt Fraser to the Bethel High School student body assembly on April 26, 1983.
2. The notice of the short term suspension of Matt Fraser for "Disruptive Behavior" dated April 27, 1983.
3. The "Request for Grievance Review" letter by Jeffrey T. Haley, Attorney for Matt Fraser dated May 3, 1983.
4. Bethel Senior High School Student Handbook, 1982-83.
5. Bethel School District Policies.
6. Testimony and written statements from Bethel High School Principal, David Rich, and other staff members regarding the issues of the suspension.

I. FINDINGS

1. Matt Fraser is a senior student enrolled in Bethel High School and is scheduled to graduate in June 1983.
2. On April 26, 1983, Matt Fraser delivered a prepared speech in his sixth period classroom to the teacher and a group of students. The text of the speech is attached as Exhibit "A" to this decision. He was advised by the teacher that the speech was inappropriate for an intended delivery at a school assembly. Matt was similarly warned by another teacher to whom he had read the prepared speech. In both instances, Matt indicated that he was going to deliver his speech as prepared.
3. On April 26, 1983, students were required to attend either the assembly or a study hall. Matt Fraser delivered the above noted prepared speech to the total high school assembly.
4. The text of the speech contains a number of words and phrases with sexual innuendoes and connotations. Matt used dramatic pauses and voice inflection to emphasize the sexual overtones of his speech. During the course of the speech, many students reacted with loud laughing, cheering, whistling, foot stomping, and clapping.
5. On April 27, 1983, at least six written statements were delivered to Mr. Rich by teachers who were concerned that Matt Fraser's speech was inappropriate and disruptive at a high school assembly.
6. On April 27, 1983, at least one teacher wrote to Mr. Rich that the educational process for most of her first period class was disrupted due to a student discussion of said speech. Student consensus in this class about the speech was negative. The students' statements indicated "they felt embarrassed, disgusted and insulted" by the speech. Classroom disruptions were reported by other teachers following the speech.

7. After Matt Fraser delivered the speech on April 26, 1983, Mr. Rich, Principal at Bethel High School, called him at home and directed him to report to his office Wednesday morning. On Wednesday, April 27, 1983, Matt Fraser met with Ms. Ingle, Assistant Principal of Bethel High School. At this conference, he was given both oral and written notice of his alleged misconduct and the alleged violation of the applicable school district rule, and copies of written evidence in the District's possession in support of the allegations against him. Matt Fraser was provided an opportunity to present his explanation of the circumstances. Ms. Ingle imposed punishment for a violation of the school's disruptive conduct rule consisting of a three-day short term suspension and removal of his name from consideration as a graduation speaker. Matt Fraser was given an explanation of this punishment and provided a copy of the appeal/grievance procedure. Following this conference, Ms. Ingle called Matt Fraser's mother and informed her of the District's action and the reasons supporting it.
8. Matt Fraser subsequently initiated a grievance of this action and on Friday, April 29, 1983 the District stayed the final day of the three-day suspension and removal of Matt's name from the ballot for graduation speakers pending the determination of his grievance at the Superintendent's level.
9. The speech Matt delivered conveyed a sexual meaning that was indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly. The speech also caused a material and substantial interference with the education process by provoking a boisterous and unruly response from many students during the assembly and in subsequent school classes.
10. The 1982-83 Student Handbook of the Bethel Senior High School, in Section 1, contains rules governing the conduct of students at Bethel High School. On page

8, the section entitled "District Offenses" provides, in relevant part:

In addition to the criminal acts defined above, the commission of, or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally these are acts which disrupt and interfere with the educational process.

...

Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited including the use of obscene, profane language or gestures.

This rule book has been made available to all students of Bethel High School and their parents on an annual basis.

11. The suspension and discipline imposed on Matt Fraser was not influenced by any prior criticism he has made concerning the school administration and was not intended to suppress ideas or political views.

II. CONCLUSIONS

1) The hearing officer has jurisdiction over both the subject matter and the parties to this grievance procedure pursuant to R.C.W. 28A.58.101 and Chapter 180-40 WAC.

2) Bethel High School's rule entitled "Disruptive Conduct" was validly enacted.

3) The term "obscene" in the disruptive conduct rule must be given its common and ordinary meaning. Conduct or language is "obscene" if it is "offensive to modesty or decency; indecent, lewd." Random House Dictionary of the English Language, at 994 (1969).

4) Matt Fraser's speech was obscene within the meaning of the disruptive conduct rule and violated that rule.

5) Matt Fraser's speech was conduct that materially and substantially interfered with the educational process in violation of the disruptive conduct rule.

6) Both the three-day suspension and removal of Matt Fraser's name from consideration as a commencement speaker is reasonably warranted by the nature and circumstances of his conduct.

7) Based upon prior warning given to Matt Fraser concerning delivery of his speech, imposition of a short term suspension and discipline was justified because the District had good reason to believe that other forms of corrective action or punishment would fail if employed.

8) The disciplinary action and suspension were administered in accordance with the procedural and substantive requirements of Chapter 180-40 WAC.

9) The District's action did not violate Matt Fraser's right, as incorporated by WAC 180-40-215, to engage in constitutionally protected speech.

10) The disciplinary action and three-day suspension regarding Matt Fraser should be affirmed.

III. DECISION

The three-day suspension of Matt Fraser and the removal of his name from the list of candidates for graduation speaker is affirmed.

DATED this 17th day of May, 1983.

/s/

J. BRUCE ALEXANDER, Ph.D.

Hearing Officer

Bethel School District No. 403

lsl

No. 84-1667

Supreme Court, U.S.

FILED

NOV 27 1984

JOSEPH E. SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1984

BETHEL SCHOOL DISTRICT NO. 403;
CHRISTY B. INGLE; DAVID C. RICH;
J. BRUCE ALEXANDER; AND
GERALD E. HOSMAN,

Petitioners,

vs.

MATTHEW N. FRASER, A MINOR,
AND E. L. FRASER, AS HIS
GUARDIAN AD LITEM,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

KANE, VANDEBERG, HARTINGER
& WALKER
First Interstate Plaza
Suite 2000
Tacoma, WA 98402-4391
Telephone: (206) 383-3791

By: WILLAM A. COATS
Counsel of Record
and
CLIFFORD D. FOSTER, JR.
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 833-7427 Ext. 333

BEST AVAILABLE COPY

53P12

QUESTIONS PRESENTED

1. Whether the first amendment of the Federal Constitution prohibited public school officials from imposing a three-day suspension from school on a high school student who gave a speech at an all-school assembly containing sexual innuendo, and which was considered indecent, demeaning to female students, and inappropriate by school authorities?

2. Whether a high school disciplinary rule prohibiting students from engaging in conduct "which materially and substantially interferes with the educational process . . . , including the use of obscene, profane language or gestures," is unconstitutional on its face under the first amendment and the due process clause of the fourteenth amendment of the Federal Constitution?

3. Whether the failure of school district rules to define each specific form of disciplinary action that could be imposed upon a student violated the due process clause of the fourteenth amendment of the Federal Constitution?

4. Whether the District Court erred in raising and deciding issues of state law *sua sponte* that were neither raised by the pleadings nor tried by the implicit consent of the parties?

LIST OF PARTIES

The parties to this proceeding in the United States District Court for the Western District of Washington, in the Ninth Circuit, and before this Court were Plaintiffs Matthew N. Fraser, a minor, and E. L. Fraser, as his guardian ad litem, the Respondents herein. The Defendants were Bethel School District No. 403, a municipal corporation, Pierce County, Washington; Christy B. Ingle; David C. Rich; J. Bruce Alexander; and Gerald E. Hosman. All of the Defendants are Petitioners herein.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND SCHOOL DISTRICT RULE INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. THE DISTRICT DID NOT VIOLATE FRASER'S FIRST AMENDMENT RIGHTS.....	10
A. Student First Amendment Rights Must Be Viewed in Light of the Special Char- acteristics of the Public School Environ- ment	10
B. The Ninth Circuit Misapplied <i>Tinker</i> and the "Public Forum" Doctrine	12
C. The District Has the Authority to Regu- late Indecent Student Speech	17
1. Protection of a Captive Audience	21
2. Controlling Presentation of Sexual Topics to Children	23
3. Dispelling the Impression of District Approval	25
4. The Constitutional Rights of School Children Are Not Co-extensive With Those of Adults	26

TABLE OF CONTENTS—Continued

	Pages
D. Fraser Failed to Show the District Suppressed his Viewpoint	27
II. THE DISTRICT'S DISRUPTIVE CONDUCT RULE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD	29
III. THE DISTRICT DID NOT VIOLATE FRASER'S RIGHTS UNDER THE DUE PROCESS CLAUSE BY FAILING TO DEFINE EACH FORM OF DISCIPLINE THAT COULD BE IMPOSED	36
IV. THE DISTRICT COURT ERRED IN RAISING AND DECIDING STATE LAW ISSUES SUA SPONTE	38
CONCLUSION	41

TABLE OF AUTHORITIES

CASES :	Pages
<i>Adderley v. Florida</i> , 383 U.S. 39 (1966)	14
<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979)	10
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	30, 31
<i>Berns v. Civil Service Commission</i> , 537 F.2d 714 (2d Cir. 1976)	40
<i>Black Coalition v. Portland School District No. 1</i> , 484 F.2d 1040 (9th Cir. 1973)	31
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	10, 11, 12, 19, 26, 28
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	34
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	10
<i>Bundy v. Jackson</i> , 641 F.2d 934 (D.C. Cir. 1981)	26
<i>CSC v. Letter Carriers</i> , 414 U.S. 548 (1973)	32
<i>Clark v. Community for Creative Nonviolence</i> , 468 U.S. —, 104 S. Ct. 3065 (1984)	20
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	22, 23, 26
<i>Consolidated Edison v. Public Service Commis- sion</i> , 447 U.S. 530 (1980)	21
<i>Cook v. City of Price</i> , 566 F.2d 699 (10th Cir. 1977)	39
<i>Cornelius v. NAACP Legal Defense and Educa- tion Fund, Inc.</i> , — U.S. —, 105 S. Ct. 3439 (1985)	14, 15, 17
<i>Deakyn v. Commissioners of Lewes</i> , 416 F.2d 290 (3d Cir. 1969)	39
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	10
<i>Esteban v. Central Missouri State College</i> , 415 F.2d 1077 (8th Cir. 1969), <i>cert. denied</i> , 398 U.S. 965 (1970)	31

TABLE OF AUTHORITIES—Continued

	Page
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	19, 20, 21, 23
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	23, 25, 27, 35
<i>Glasgow v. Georgia Pacific Corp.</i> , 103 Wash. 2d 401, 693 P.2d 708 (1985)	26
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975)	11, 29, 30, 38
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	31
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	14
<i>Hagans v. Lavine</i> , 415 U.S. 528 (1974)	39
<i>Hall v. Board of Commissioners</i> , 681 F.2d 965 (5th Cir. 1982)	31
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1976)	12, 30, 37
<i>Lehman v. City of Shaker Heights</i> , 418 U.S. 298 (1974)	21
<i>Madison School District v. Wisconsin Employ- ment Relations Commission</i> , 429 U.S. 167 (1976)	15
<i>McCluskey v. Board of Education</i> , 458 U.S. 966 (1982) (per curiam)	32
<i>Meehan v. Macey</i> , 392 F.2d 822, <i>aff'd en banc</i> , 425 F.2d 472 (D.C. Cir. 1969)	30
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	24
<i>Miller v. California</i> , 415 U.S. 15 (1973)	34
<i>Mt. Healthy City Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	28
<i>Murray v. West Baton Rouge Parish School Board</i> , 472 F.2d 438 (5th Cir. 1973)	31, 34
<i>New Jersey v. T.L.O.</i> , 469 U.S. —, 105 S. Ct. 733 (1985)	11, 29, 33
<i>Nitzberg v. Parks</i> , 525 F.2d 378 (4th Cir. 1975)	31
<i>Norton v. Discipline Committee</i> , 419 F.2d 195 (6th Cir. 1969), <i>cert. denied</i> , 399 U.S. 906 (1970)	31

TABLE OF AUTHORITIES—Continued

	Page
<i>Packer Corp. v. Utah</i> , 285 U.S. 105 (1932)	21
<i>Papish v. University of Missouri</i> , 410 U.S. 667 (1973) (per curiam)	31
<i>Paris Adult Theatre I v. Slaton</i> , 413 U.S. 49 (1973)	22, 23
<i>Perry Education Association v. Perry Local Edu- cators' Association</i> , 460 U.S. 37 (1983)	13, 14, 17
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	11
<i>Powell v. McCormick</i> , 395 U.S. 486 (1969)	36
<i>Public Utilities Commission v. Pollak</i> , 343 U.S. 451 (1952)	21
<i>Quinlan v. University Place School District</i> , 35 Wash. App. 260, 660 P.2d 329 (Wash. Ct. App. 1983)	41
<i>Rosenfeld v. New Jersey</i> , 408 U.S. 901 (1972)	22
<i>Rowan v. Post Office Department</i> , 397 U.S. 728 (1970)	22
<i>Ryan v. Aurora City Board of Education</i> , 540 F.2d 222 (6th Cir. 1976)	40
<i>Seyfried v. Walton</i> , 668 F.2d 214 (3d Cir. 1981)	25
<i>Thomas v. Board of Education</i> , 607 F.2d 1043 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980)	13, 17
<i>Tinker v. Des Moines School District</i> , 393 U.S. 503 (1969)	10, 12, 13, 23, 26, 27, 28, 33
<i>Trachtman v. Anker</i> , 563 F.2d 512 (2d Cir. 1977)	24
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715 (1966)	39
<i>United States Postal Service v. Council of Green- burgh Civic Association</i> , 453 U.S. 114 (1981)	15
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	15, 16

TABLE OF AUTHORITIES—Continued

	Pages
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	11, 32, 40
<i>Young v. American Mini Theatres</i> , 427 U.S. 50 (1976)	20, 21
 CONSTITUTIONS, STATUTES, AND REGULATIONS:	
U.S. Const. amend. I	passim
U.S. Const. amend. XIV, § 1	2, 29, 36, 37
The Equal Access Act of 1984, 20 U.S.C. §§ 4071- 4074 (Supp. 1985)	16, 17
Title IX of the Federal Education Act Amend- ments of 1972, 20 U.S.C.A. § 1681 (1978)	25
28 U.S.C. § 1254(1) (1976)	1
42 U.S.C. § 1983 (1976)	5
Fed. Rule Civ. Proc. 15(b)	39
The Equal Rights Amendment of the Washington Constitution. Article XXXI, § 1 (Amendment 61)	25
Wash. Rev. Code Ch. 28A.85	25
Wash. Rev. Code § 28A.27.010 (1983)	22
Wash. Rev. Code § 28A.58.115 (1983)	16
Wash. Rev. Code § 28A.58.1011 (1983)	35
Wash. Rev. Code § 28A.58.758 (1983)	11
Wash. Admin. Code R. 392-138-010(2) (Supp. 1984)	16
Wash. Admin. Code R. 180-50-140(1) (1983)	24
Wash. Admin. Code R. 180-40-205(1) (1983)	37
Wash. Admin. Code R. 180-40-240 (1983)	37, 38
Wash. Admin. Code R. 180-40-245(2) (1983)	40

TABLE OF AUTHORITIES—Continued

	Pages
Wash. Admin. Code R. 180-40-225 (1933)	35
Bethel High School Disruptive Conduct Rule	2, 29, 32, 33, 34, 35, 36
OTHER AUTHORITIES:	
3 J. Moore, <i>Moore's Federal Practice</i> ¶ 15.13[2] (2d ed. 1983)	39
Diamond, <i>The First Amendment and Public Schools: The Case Against Judicial Inter- vention</i> , 59 Tex. L. Rev. 477 (1981)	11, 18
Farber & Nowak, <i>The Misleading Nature of Public Forum Analysis: Context and Content in First Amendment Adjudication</i> , 70 Va. L. Rev. 1219 (1984)	14
Garvey, <i>Children and the First Amendment</i> , 57 Tex. L. Rev. 321 (1979)	24, 26
Haskell, <i>Student Expression in the Public Schools: Tinker Distinguished</i> , 59 Geo. L.J. 37 (1970)	13, 18
L. Tribe, <i>American Constitutional Law</i> 576-79 (1978)	26



OPINIONS BELOW

The opinion of the Court of Appeals is reported at 755 F.2d 1356 (9th Cir. 1985). PA at A1-A65.¹ The oral opinion (PA at B11-B50), Findings of Fact and Conclusions of Law (PA at B1-B10), Injunction and Declaratory Judgment (PA at C1-C3), and Judgment (PA at C4-C5) of the United States District Court for the Western District of Washington, the Honorable Jack E. Tanner presiding, are unreported.

o

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered March 4, 1985. The Petition for Writ of Certiorari by Petitioners was filed April 19, 1985, and was granted October 7, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976).

o

CONSTITUTIONAL PROVISIONS AND SCHOOL DISTRICT RULE INVOLVED

United States Constitution, Amendment I:

Congress shall make no law . . . abridging the freedom of speech

¹"PA" refers to the Appendix to the District's Petition for Writ of Certiorari, No. 84-1667. "JA" refers to the Joint Appendix.

United States Constitution, Amendment XIV, § 1:

... [N]or shall any state deprive any person of life, liberty, or property, without due process of law

Bethel High School Disruptive Conduct Rule:

In addition to the criminal acts defined above, the commission of or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.

Disruptive Conduct.

Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

STATEMENT OF THE CASE

In April of 1983, Plaintiff Matthew Fraser ("Fraser") was a 17-year-old high school senior attending Bethel High School, a public school operated by Defendant Bethel School District No. 403, Pierce County, Washington ("District"). On April 26, 1983, the District conducted an all-school assembly during the regularly scheduled school day that was attended by approximately 600 students. JA at 127. Attendance at the assembly was mandatory for all pupils, unless they chose to report to a study hall. JA at 101.

The District convened the assembly for the purpose of campaign speeches for students seeking election as officers of the school's associated student body, a formal organiza-

tion of students established by the District under state law. At the assembly, Fraser gave the following speech:

I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax — for each and every one of you.

So vote for Jeff for ASB vice president — he'll never come between you and the best our high school can be.

JA at 47. During the speech, a school counselor observed students hooting and yelling, and one student simulating masturbation. JA at 36. The counselor observed two other students simulating sexual intercourse by movement of their hips. *Id.* The assembly concluded at its scheduled time and the students were dismissed without further incident. JA at 50.

The next morning, Bethel High School administrators gave Fraser oral and written notice of their allegation that his speech violated the school's disruptive conduct rule. JA at 102. He was given the written evidence school officials had received concerning the allegations against him and an opportunity to explain his conduct. *Id.* After these discussions, Fraser was informed that his speech violated the disruptive conduct rule, that he would be suspended from school for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement ceremony. *Id.*

Fraser grieved the disciplinary action to the District's designated hearing officer, J. Bruce Alexander. After re-

ceiving written argument from Fraser's legal counsel, and reviewing the circumstances surrounding Fraser's conduct, Alexander issued a decision on May 17, 1983. JA at 100-05. The examiner made the following findings:

4. The text of the speech contains a number of words and phrases with sexual innuendos and connotations. Matt used dramatic pauses and voice inflection to emphasize the sexual overtones of his speech. During the course of the speech, many students reacted with loud laughing, cheering, whistling, foot stomping, and clapping.

.

6. On April 27, 1983, at least one teacher wrote to Mr. Rich that the educational process for most of her first period class was disrupted due to a student discussion of Fraser's speech. Student consensus in this class about the speech was negative. The students' statements indicated "they felt embarrassed, disgusted and insulted" by the speech. Classroom disruptions were reported by other teachers following the speech.

.

9. The speech Matt delivered conveyed a sexual meaning that was indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly. The speech also caused a material and substantial interference of the educational process by provoking a boisterous and unruly response from many students during the assembly and in subsequent school classes.

.

11. The suspension and discipline imposed on Matt Fraser was not influenced by any prior criticism he has made concerning the school administration and was not intended to suppress ideas or political views.

JA at 101-02. From these findings, the examiner concluded:

3. The term "obscene" in the disruptive conduct rule must be given its common and ordinary meaning. Conduct or language is "obscene" if it is "offensive to modesty or decency; indecent, lewd." Random House Dictionary of the English Language, at 994 (1969).

4. Matt Fraser's speech was obscene within the meaning of the disruptive conduct rule and he violated that rule.

5. Matt Fraser's speech was conduct that materially and substantially interfered with the educational process in violation of the disruptive conduct rule.

JA at 103-04. The examiner affirmed the discipline in its entirety.

This litigation followed with a complaint filed on May 23, 1983, alleging violations of Fraser's federal constitutional rights under 42 U.S.C. § 1983 (1976) and seeking declaratory, injunctive, and monetary relief. After a one-half day hearing on May 31, 1983, the United States District Court for the Western District of Washington, the Honorable Jack E. Tanner presiding, orally ruled against the District.

On June 8, 1983, the district court issued Findings of Fact and Conclusions of Law, and a Declaratory Judgment and Injunction requiring the District to allow Fraser to speak at the Bethel High School commencement ceremony that evening. The court held that (1) the suspension violated Fraser's rights of free expression under the first amendment of the Federal Constitution; (2) the school's

disruptive conduct rule was unconstitutionally vague and overbroad; (3) the failure of the disciplinary rules to specify removal of a student's name from the list of graduation speaker candidates violated the due process clause of the fourteenth amendment; and (4) *sua sponte*, the District's suspension violated state law. PA at B1-B10, C1-C3. On September 1, 1983, the court entered its final Judgment awarding Fraser \$278.00 in damages for violation of his constitutional rights, as well as litigation costs and attorneys' fees in the amount of \$12,750.00. PA at C4-C5. The District timely perfected appeals of these judgments to the Court of Appeals for the Ninth Circuit on July 8, 1983, and September 15, 1983.

On March 4, 1985, a three-judge panel of the Ninth Circuit, with the Honorable Eugene A. Wright dissenting, issued an opinion affirming the district court's judgment, but vacating the graduation ceremony injunction as moot.

On April 19, 1985, the District and individual defendants filed a Petition for a Writ of Certiorari in this Court. On October 7, 1985, that petition was granted.

—o—

SUMMARY OF ARGUMENT

Question 1. The compelling state interests in public education, including the inculcation of community values, effective student discipline, and local control of educational policy, limit student rights of free expression in the secondary schools.

The District did not violate Fraser's first amendment rights because he failed to show the discipline against him

was motivated by an intent to suppress or otherwise discriminate against his viewpoint. The assembly at which he spoke was not a first amendment public forum, but a nonpublic educational activity. The District's discipline was not only a reasonable and viewpoint neutral regulation of his speech in light of the surrounding circumstances, but also necessary to regulate expressive activity strictly incompatible with the District's educational interests.

The District had authority to regulate Fraser's indecent and offensive sexual talk because it has the responsibility to inculcate community standards of decency and civility in student discourse. The speech was demonstrably disruptive to the District's educational program, and viewpoint neutral regulation in the limited confines of the school environment does not threaten core first amendment values. The discipline was further necessary to protect a captive audience of students from invasion of their privacy rights, to deter unconsented and irresponsible presentation of sexual topics to children, and to dispel any impression that the District tolerated or authorized the speech. Affording indecent student speech constitutional protection also does not further the instrumental values underlying free speech rights of school children.

Fraser failed to make the required threshold showing that the District suppressed his viewpoint. Instead, the record reveals that the discipline was viewpoint neutral, the speech was strictly incompatible with the District's educational activities, and the discipline was both reasonable and necessary to protect constitutionally significant educational interests.

Question 2. The District's disruptive conduct rule is neither unconstitutionally vague nor overbroad. Within

the school environment, the need for discipline can arise in an infinite variety of factual situations, requiring effective and prompt disciplinary action.

Like rules for public employee conduct, school disciplinary rules must contain general proscriptions to be effective. Most federal courts have refused to apply criminal law standards for vagueness and overbreadth to school disciplinary rules, and have correctly held that general proscriptions against disruptive conduct provide fair notice of proscribed conduct to students. The District's interpretation that the "obscene" language proscribed by the rule is language offensive to modesty or decency was a reasonable construction. Given the limitations of language, the potential for students to find new ways to disrupt school activities, and the need to maintain order in the school environment, the rule gave fair notice to Fraser and was not unconstitutionally vague.

These same factors sustain the rule against an overbreadth challenge. The rule is viewpoint neutral on its face and applies only to speech that is not constitutionally protected within the confines of the school environment. Because the rule is designed to prohibit disruptive conduct, and because indecent or profane student language causes a predictable disruption to the learning process, the rule does not pose a significant deterrent to the exercise of first amendment rights. Any potential overbreadth of the District's disruptive conduct rule is neither real nor substantial when judged against its legitimate goals.

Strict application of vagueness and overbreadth doctrines to school disciplinary rules also thwarts the educational interest in regulating indecent student speech,

unduly limits discretion in disciplinary matters, and usurps community control over the development of disciplinary rules.

Question 3. The District Court erred in holding that removal of Fraser's name as a candidate for graduation speaker violated due process because the District's disciplinary rules did not specify such action as a potential form of punishment. School disciplinary rules need only provide students reasonable notice of potential penalties and significant procedural safeguards exist to correct arbitrary disciplinary actions.

Requiring each form of potential discipline to be set out in writing would pose a substantial burden on educators and deprive them of discretion to tailor punishment according to individualized circumstances. In light of the need for discretion to administer immediate and effective disciplinary action, and the procedural safeguards available under Washington law, the due process clause does not require the District to set forth each potential form of punishment in its disciplinary rules.

Question 4. The District Court erred in deciding *sua sponte* an issue of state law unrelated to Fraser's federal claims. The District Court raised the issue in a manner that substantially prejudiced the District because it had no opportunity to respond to the issue. The District Court's exercise of pendent jurisdiction over the state claim was also an abuse of discretion because the federal judiciary should not intervene in state law issues relating to the daily operation of the public schools. Finally, the District Court incorrectly determined the merits of the state law issue because the District fully complied with the requirements

for imposing a short term suspension upon Fraser under Washington law.

ARGUMENT

I.

THE DISTRICT DID NOT VIOLATE FRASER'S FIRST AMENDMENT RIGHTS

A. Student First Amendment Rights Must Be Viewed in Light of the Special Characteris- tics of the Public School Environment.

"Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Because of this compelling state interest in education, first amendment jurisprudence requires a delicate judicial balance between student expressive activities and the special characteristics and institutional needs of the public school environment. *Board of Education v. Pico*, 457 U.S. 853, 863-66 (1982); *Tinker v. Des Moines School District*, 393 U.S. 503, 506-09 (1969). These unique demands on the state in its role as educator further require a showing that basic first amendment freedoms are "directly" and "sharply" implicated prior to judicial intervention in the operation of the public schools. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This Court has also recognized that primary and secondary public schools not only provide academic instruction, but also socialize children for participation in our society through the inculcation of values:

We have also acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). We are therefore

in full agreement with the petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values' and that '*there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.*'

Pico, 457 U.S. at 864 (emphasis added); *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 496-505 (1981).

To maintain an environment in which these learning and socialization processes may occur, local school boards and school administrators must be entrusted with broad discretionary authority in student disciplinary matters. *New Jersey v. T.L.O.*, 469 U.S. —, 105 S. Ct. 733, 742-43 (1985); *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Student discipline is more than a means to maintain order within the confines of the school; in itself it is a "valuable educational device." *Id.* at 580. Because disciplinary actions implicate both the professional expertise of educators and a school's interest in the preservation of an orderly environment, judicial intervention must be carefully guarded. *See Wood v. Strickland*, 420 U.S. 308, 326 (1975).

Finally, a uniquely democratic process governs public education. In the Bethel School District, as in most public schools, a locally elected board of directors and professional educators determine educational policy, including disciplinary standards, with substantial input and scrutiny from parents and the public. Wash. Rev. Code § 28A.58.758 (1983). Expectations for student conduct are developed through this collaborative, democratic, and open process that necessarily reflects and transmits local values. *Pico*,

457 U.S. at 891-92 (Burger, C.J., dissenting); *id.* at 894-97 (Powell, J., dissenting); *Ingraham v. Wright*, 430 U.S. 651, 670-72 (1977). To avoid a national educational policy for standards of student conduct under the guise of constitutional interpretation, Fraser's first amendment claims must be evaluated in light of the need for substantial judicial deference to the political processes governing public education.

B. The Ninth Circuit Misapplied Tinker and the "Public Forum" Doctrine.

The majority opinion in the Ninth Circuit, however, ignored the District's interests in maintaining an educational environment compatible with these recognized interests. First, relying upon *Tinker*, the majority held the District was powerless to discipline Fraser absent a showing his speech provoked unmanageable behavior among other students or was "obscene" and not entitled to any constitutional protection. PA at A15-A16, A23 n.5. Second, it treated the all-school assembly at which Fraser spoke as a traditional "open public forum" for first amendment purposes. *Id.* at A41. Neither *Tinker* nor this Court's "public forum" doctrine warrants these holdings.

Tinker was a case of unconstitutional viewpoint suppression. Several students were suspended for wearing black arm bands symbolizing their opposition to United States involvement in Vietnam. The arm bands were neither offensive nor controversial for any other reason than disagreement with the political viewpoint they symbolically conveyed. The school's discipline was motivated by disapproval of the students' opinions on the war, and the action discriminated against this viewpoint by permit-

ting other forms of symbolic expression, such as the wearing of political campaign buttons or the "Iron Cross." 393 U.S. at 509-11. The students in *Tinker*, therefore, established a first amendment violation because the decisive factor for the school officials' action was an intent to suppress the students' viewpoint on a political issue. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49 n.9 (1983); *id.* at 58 (Brennan, J., dissenting).

Despite this viewpoint suppression, Justice Fortas opined that the challenged action would have been justifiable if the record contained facts "which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities." 393 U.S. at 514. Under *Tinker*, then, suppression of a student's viewpoint is constitutionally permissible only upon a showing of a substantial, actual or potential, disruption to the educational process or intrusion upon the "rights of other students." *Id.* at 508.

When school authorities discipline a student without regard to any viewpoint expressed, but rather for the indecent or offensive form of expression used, *Tinker's* "material disruption" standard is inapplicable. The black arm bands of *Tinker* did not confront the Court with the unique analytical problems of indecent or offensive student speech. *Thomas v. Board of Education*, 607 F.2d 1043, 1055 (2d Cir. 1979) (Newman, J., concurring), *cert. denied*, 444 U.S. 1081 (1980); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 Geo. L.J. 37, 49 (1970). Although the record demonstrates that Fraser's speech did cause a substantial disruption of the educational process and invaded the rights of other students, his first

amendment claim fails on a more fundamental level because he did not make a threshold showing that the District's discipline was based upon an intent to suppress or otherwise discriminate against his viewpoint.

Also underlying the Ninth Circuit's analysis of Fraser's speech rights was the erroneous assumption that the nominating assembly was a traditional open public forum for first amendment purposes. PA at A29-A32, A40-A43. This Court has recognized three categories of first amendment fora: (1) the traditional open public forum; (2) the limited public forum (or forum by designation); and (3) the nonpublic forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, — U.S. —, 105 S. Ct. 3439, 3449-51 (1985); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. at 45-46. Despite these varying categories, "public forum" analysis is essentially a technique to determine whether situational restraints on expressive activity are justified in light of the government's need to preserve its property for its intended use. *Cornelius*, 105 S. Ct. at 3448; *id.* at 3457 (Blackmun, J., dissenting). See Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Context and Content in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984). Given the emphasis in forum analysis on the compatibility of expressive activity with governmental use of property, this Court will decline to find a public forum exists if the principal function of the property would be disrupted by the expressive activity. *Cornelius*, 105 S. Ct. at 3450; *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966).

The District's all-school assembly was neither an open public forum nor a limited public forum, but a nonpublic

educational activity. Although it provided certain students an opportunity to speak in support of classmates running for associated student body office, "not every instrumentality used for communication . . . is a traditional public forum, or a forum by designation." *Cornelius*, 105 S. Ct. at 3450; *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 130 n.6 (1981). The District scheduled the assembly on a school day, during school hours, and it was open only to students and staff members, not the general public. During this school-conducted activity, the District retained the authority to set the agenda and to direct communicative activities toward specified educational goals. These characteristics of the assembly, like most aspects of a public school's educational program, bear no resemblance to recognized first amendment public fora.² *Cornelius*, 105 S. Ct. at 3461, n.3 (Blackmun, J., dissenting).

The District also had a continuing legal duty to supervise the activities at the assembly and the authority to discipline students in attendance. Under state law, the associated student body of Bethel High School is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the

²School district property, however, may take on the characteristics of traditional first amendment fora depending on the activity involved. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (university policy allowing student groups access to meeting facilities created a limited public forum); *Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (open school board meetings for discussion of school business created public forum). Nevertheless, the focus in "public forum" analysis is on the particular channel of communication in which the dispute arises. *Cornelius*, 105 S. Ct. at 3448-49. The "relevant forum" in this litigation is the school assembly at which Fraser spoke.

school district in conformity to the rules and regulations promulgated by the superintendent of public instruction" Wash. Rev. Code § 28A.58.115 (1983). The state's administrative rules further define an associated student body "program" as:

[A]ny activity which (a) is conducted in whole or part by or in behalf of an associated student body during or outside regular school hours and within or outside school grounds and facilities, and (b) if conducted with the approval and at the direction or under the supervision of the school district.

Wash. Admin. Code R. 392-138-010(2) (Supp. 1984). Finally, the school's rules define the "educational process" for the purpose of disciplinary rules as "all activities carried out during the school day." Pltf's Ex.B at 10, JA at 58-59. As a factual and legal matter, therefore, the assembly was not a public forum, but rather a nonpublic educational activity subject to the District's control.³

³The Ninth Circuit's purported distinction between "curricular" and "extracurricular" activities does not support its assumption that the assembly was a first amendment public forum. PA at A34. The District's authority over the educational process is not limited to the presentation of academic materials in the classroom. The school assembly served the important educational goal of providing a limited model of self-government. The District's statutory authority over the activity, and the clear application of the school's disciplinary rules to the school assembly, demonstrate it was directly related to the educational program.

The assembly, moreover, neither resembles the forum by designation the court found in *Widmar v. Vincent* nor the definition of a "limited open forum" in the secondary schools that Congress defined in the Equal Access Act of 1984. 20 U.S.C. §§ 4071-4074 (Supp. 1985). In *Vincent*, the student organization sought only access to unoccupied meeting rooms generally available to other student organizations. This forum by designation did not involve an activity controlled and initiated by school

(Continued on next page)

Under this Court's precedents, the District's responsibilities over this nonpublic activity allowed viewpoint neutral restrictions on Fraser's expressive activity, if such restrictions were reasonable in light of the surrounding circumstances. *Cornelius*, 105 S. Ct. at 3453; *Perry*, 460 U.S. at 46. Nevertheless, a closer examination of the educational interests implicated by indecent or offensive student speech reveals that the District's viewpoint neutral disciplinary action was not only reasonable in light of the surrounding circumstances, but also a narrowly drawn restriction necessary to further the compelling state interests of the educational process. See *Perry*, 460 U.S. at 45-46. In sum, the record demonstrates that Fraser's speech was not constitutionally protected because it was strictly incompatible with the fundamental purposes of the District's educational program.

C. The District Has the Authority to Regulate Indecent Student Speech.

Because public education may inculcate community moral values and socialize students for participation in adult society, the maintenance of standards of decency in student discourse is an appropriate goal of the educational process. In *Thomas v. Board of Education*, Justice New-

(Continued from previous page)

authorities. The Equal Access Act's definition of "limited open forum" applies only when "noncurricular related student groups" are allowed to "meet on school premises during noninstructional time." 20 U.S.C. § 4071(b) (Supp. 1985). The definitions of "noncurricular," "meeting" and "noninstructional time" in the Act further demonstrate that the District's legal responsibilities over the associated student body, its scheduling of the all-school assembly during ordinary instructional time, and the direct relation of the activity to curricular goals did not create a "limited open forum." *Id.*, § 4072.

man's concurring opinion summarized the educational interests at stake when school authorities attempt to control offensive student speech:

School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. The task may be difficult, perhaps unlikely ever to be more than marginally successful. But whether a school condemns or tolerates indecent language within its sphere of authority will have significance for the future of that school and of its students. The first amendment does not prevent a school's reasonable efforts towards the maintenance of campus standards of civility and decency. With its captive audience of children, many of whom, along with their parents, legitimately expect reasonable regulation, a school need not capitulate to a student's preference for vulgar expression.

607 F.2d at 1057 (Newman, J., concurring). Simply put, correcting an adolescent's indulgence in sexually offensive expression is an expected and permissible function of the public schools. Haskell, *supra* p. 13, at 56.

The regulation of indecent or offensive student speech is also necessary to maintain a learning environment free of disruption. Under the Ninth Circuit's analysis, however, physical disorder, not disruption of the learning process, is the touchstone for permissible regulation. This approach would allow conduct far more offensive or sexually explicit than Fraser's to go unpunished if the only reaction from other students was shocked silence. Educational experts, let alone judges, lack a full understanding of how students learn and the complicated interrelationship of social and emotional factors influencing that process. Diamond, *supra* p. 11, at 497. As Justice Wrigh's dissenting opinion correctly noted, a "speech which causes

great distraction, excitement, or embarrassment among the students may disrupt the educational process as greatly as one which results in fist fights." PA at A61-A62.

The record demonstrates the District's determination that Fraser's speech caused a substantial disruption to the learning process was reasonable: (1) several students responded to the speech by simulating masturbation and acts of intercourse, JA at 36; (2) classroom discussions the following day were diverted to the topic of Fraser's speech, including student expressions of disgust and embarrassment, JA at 42-43, 101; and (3) Ms. Rindetta Stewart, an independent educational expert on sex equity in education, testified at trial that the speech was sexist, demeaning to female students, and disruptive to their learning processes. JA at 72-81. Because educators, not judges, can best determine both the potential for and existence of disruption in the educational environment, the lower courts erred by not recognizing that Fraser's speech posed a significant threat of disruption to the learning environment, and was substantially disruptive in fact.

Viewpoint neutral regulation of indecent student speech, moreover, does not implicate the core first amendment values of protecting the exchange of ideas. As Justice Stevens observed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978):

A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. at 743 n.18. Similarly, in *Pico* the Court's opinions recognized that even in the voluntary realm of inquiry of

a school library, school officials have authority to remove indecent or offensive materials, provided that the motivating factor is neither the purposeful suppression of ideas, 456 U.S. at 871-72 (plurality opinion); *id.* at 879-81 (Blackmun, J., concurring); nor the selection of a particular viewpoint for prohibition. *Id.* at 918-20 (Rehnquist, J., dissenting). Given the deleterious effects indecent expressive activity has on the school environment, and the educational interest in correcting offensive expression, disciplinary actions for such speech that respect the government's fundamental obligation of viewpoint neutrality are constitutionally permissible. *See id.*; *Pacifica*, 438 U.S. at 744-51; *Young v. American Mini Theatres*, 427 U.S. 50, 69-71 (1976).

The District's interest in regulating indecent, but not constitutionally obscene, student speech is further warranted on nuisance grounds. *See Pacifica*, 438 U.S. at 750-51. The scope of the District's authority over student speech is geographically and temporally limited, in most respects, to the schoolhouse grounds and school day. The record does not allow an inference that Fraser was prohibited from indulging his taste for sexual humor with fellow students outside of the assembly or during nonschool time. The District's limited regulatory authority left him "ample alternative channels for communication." *Clark v. Community for Creative Nonviolence*, 468 U.S. —, 104 S. Ct. 3065, 3069 (1984). Because the District has an educational interest in deterring offensive speech at school, discipline for such expressive activity is analogous not only to removing the "pig from the parlor," but also to reprimanding a student for talking about the World Series during history class—a clearly permissible educational

prerogative. See *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 545 (1980) (Stevens, J., concurring). The District's viewpoint neutral discipline, therefore, did not suppress completely Fraser's communicative activity, but only removed it from an environment where it posed the potential for harmful secondary effects. See *American Mini Theatres*, 427 U.S. at 69-73.

Subsumed within the District's general interest in regulating indecent student speech are other particular features of the educational environment that provide constitutionally sufficient grounds for its disciplinary action.

1. Protection of a Captive Audience.

The District had an interest in protecting school children at the assembly from unconsented and unexpected exposure to Fraser's depiction of sexual activity. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a prohibition of political advertising on public transit buses. Relying upon both *Packer Corp. v. Utah*, 285 U.S. 105 (1932), and Justice Douglas' dissent in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court held that the city's managerial decision to limit advertising to less controversial topics so as not to impose upon the captive audiences of transit riders sustained the ban in light of the forum involved. 418 U.S. at 302-04.

Similarly, in *Pacifica* the Court sustained the imposition of penalties against a broadcaster that aired an offensive, but not constitutionally obscene, comedy monologue. The decision was based, in part, on the FCC's power to protect members of the broadcast audience, which included

children, from unexpectedly hearing indecent language on the radio. 438 U.S. at 748-49.

Finally, in *Cohen v. California*, 403 U.S. 15 (1971), Justice Harlan observed that the constitutional authority of government to regulate discourse to protect listeners is permissible upon a showing that "substantial privacy interests" are invaded in "an essentially intolerable manner." *Id.* at 21. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 113 (1973) (Brennan, J., dissenting); *Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting).

Under these precedents, discipline of Fraser's speech was necessary to protect a captive audience. Attendance in the District is mandatory for all children between the ages of 8 to 14 years, and for most children between the ages of 15 and 17. Wash. Rev. Code § 28A.27.010 (1983). Attendance at the assembly, moreover, was required for all students in the school, unless they opted to attend a study hall. JA at 101. Testimony indicated that students and staff present had no practical means of exiting the gymnasium during Fraser's brief talk. JA at 36-37.

Fraser's calculated and crude depiction of sexual activity invaded his listeners' privacy rights in an inescapable and intolerable manner. Sexuality is a sensitive topic for most persons in our society, perhaps acutely so for adolescents and young adults, and one that the judicial system has traditionally regarded as implicating substantial privacy interests. *Rowan v. Post Office Department*, 397 U.S. 728 (1970) (restrictions on mailing sexual materials). Ms. Stewart's testimony at trial opined that Fraser's speech was both sexually demeaning to female

students and threatened to invade their very "being." JA at 79. Attendees also had no warning that a talk describing the sexual prowess of a candidate for student office would be given. To be sure, students may have "averted their eyes" from the simulated intercourse or masturbation Fraser's speech provoked, but they had no choice but to endure his talk and, at best, try not to listen. Fraser's speech, therefore, violated fundamental privacy interests of other students in a manner warranting discipline based on the plight of a captive audience. *See Cohen*, 403 U.S. at 291; *Tinker*, 393 U.S. at 508.

2. Controlling Presentation of Sexual Topics to Children.

The District could also discipline Fraser's speech because of its authority to control the manner in which sexual topics are presented to school children. First amendment doctrine has long recognized that the state may regulate the dissemination of sexual materials to children, even if such materials are not "obscene." *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). *See Paris Adult Theatre I*, 413 U.S. at 113 (Brennan, J., dissenting). This authority is founded upon the state's interest in preserving parental authority over sexual topics and its independent interest in the welfare of youth. *Ginsberg*, 390 U.S. at 639-40. It also extends to the protection of children from unexpected exposure to indecent sexual materials or other forms of offensive expression. *Pacifica*, 438 U.S. at 749-50.

Within the public school environment, the varying ages and levels of maturity of school children, and the diversity of parental attitudes and expectations for their

children concerning sexuality, create a strong educational interest in presenting sexual matters in a responsible manner. Indeed, presentation of this topic in an irresponsible fashion can have serious and permanent harmful effects on adolescents. *Trachtman v. Anker*, 563 F.2d 512, 519-20 (2d Cir. 1977).

An administrative rule of the Washington State Board of Education demonstrates these concerns. The rule provides:

The decision as to whether or not a program about sex education or human sexuality is to be introduced into the common schools is a matter for determination at the district level by the local board, the duly elected representatives of the people of the community. . . .

Wash. Admin. Code R. 180-50-140(1) (1983). The rule further mandates involvement of parents and community groups in the planning and evaluation of instruction on these topics, and requires school districts to allow parents to excuse their children from any planned instruction. Like this rule, the District's discipline of Fraser for his irresponsible depiction of sexual activity before the entire school population was a legitimate attempt to regulate how information on this sensitive and potentially harmful topic will be presented to impressionable adolescents, and to reinforce parental authority over the flow of information on the subject. See *Trachtman v. Anker*, 563 F.2d at 519-20; Garvey, *Children and the First Amendment*, 57 Tex. L. Rev. 321, 375-79 (1979). See also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (*dicta* recognizing schools may withhold information from students reasonably regarded as harmful).

3. Dispelling the Impression of District Approval.

The District's actions were further necessary to dispel any impression among students and the public that it approved of speech incompatible with its educational program. A public school has an "important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program." *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981). Similarly, an undisputed impression that school officials tolerate speech demeaning to female students may be more harmful than the speech itself. See *Ginsberg v. New York*, 390 U.S. at 642-43. The District's plenary authority over the campaign assembly carried a substantial risk that impressionable students (or parents) would perceive Fraser's conduct as authorized absent disciplinary action.

The discipline also furthered the educational policy of Congress and the State of Washington to provide equal educational opportunity to female students. The Equal Rights Amendment of the Washington Constitution, Article XXXI, § 1 (Amendment 61), and Chapter 28A.85 of the Washington Revised Code, mandate that each school district maintain educational programs free from discrimination on the basis of sex. Title IX of the Federal Education Act Amendments of 1972, 20 U.S.C.A. § 1681 (1978), contains similar prohibitions. As the District's expert testified, Fraser's depiction of sexual activity was uniquely demeaning to female students and was a form of sexual harassment. JA at 78-80.

In the analogous context of employment discrimination law, both Washington and federal courts have required

employers to correct and prevent conduct, including sexually harassing speech, that creates a hostile work environment for female employees. *See Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Glasgow v. Georgia Pacific Corp.*, 103 Wash. 2d 401, 693 P.2d 708 (1985). Based on the potentially harmful effect Fraser's speech had on female students and their learning environment, and the need to remove an imprimatur of official tolerance, the District promoted recognized public educational policy by disciplining Fraser.

4. The Constitutional Rights of School Children Are Not Co-extensive With Those of Adults.

Affording indecent student speech constitutional protection also does not further the underlying rationales for student free expression rights. Both *Pico* and *Tinker* recognize that student first amendment rights serve instrumental values of helping to prepare students for effective participation in the political and social processes of adult society. 457 U.S. at 868; 393 U.S. at 512. *See* Garvey, *supra* p. 24, at 344-56. In contrast, adult first amendment values are both instrumental and ends-in-themselves, and are predicated upon the assumption that sellers and buyers in the marketplace of ideas make their decisions in an informed and mature manner. *Cohen v. California*, 403 U.S. at 24. *See* L. Tribe, *American Constitutional Law* 576-79 (1978). For secondary public school students, even those approaching graduation, this assumption cannot be made because they remain subject to the government's interest in teaching students community standards of decency in communicative activity.

A minor's inability to exercise a mature or informed choice may limit the exercise of his or her first amendment rights. *Tinker*, 393 U.S. at 315 (Stewart, J., concurring); *Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring). In the school environment, unfettered student expressive activity of an indecent or offensive character thwarts the educational goals of teaching students socially responsible standards of behavior and respect for others' sensibilities. Permitting such activity impedes, not promotes, the instrumental values underlying student first amendment rights. To be sure, constitutionally protected expressive activity of adults can be as eloquent or tasteless as the speaker desires; but for student speakers and audiences, who are presumptively incapable of making mature decisions on such matters, viewpoint neutral regulation of indecent or offensive expression is permissible because of the particularized and compelling needs of the educational process, and the correspondingly lesser free expression rights of children.

D. Fraser Failed to Show the District Suppressed his Viewpoint.

Given these educational interests in regulating indecent speech, the District's disciplinary action was reasonable in light of the surrounding circumstances. The record demonstrates the discipline was based upon the strict incompatibility of Fraser's speech with the District's educational purposes—i.e., the predictable threat of disruption to the learning process indecent student speech involves and the substantial disruption Fraser's speech actually caused. Most significantly, however, the record is devoid of evidence that the District's action was motivated by

disagreement with any viewpoint Fraser expressed. *Pico*, 457 U.S. at 871-72; *Tinker*, 393 U.S. at 510-11; *id.* at 526 (Harlan, J., dissenting). Accordingly, he failed to demonstrate a constitutional violation.⁴

Recognizing the District's constitutional authority to regulate indecent, but not constitutionally obscene, student speech does not grant unbridled discretion to school administrators. The Ninth Circuit's fear that an "amorphous standard of 'indecenty'" would "increase the risk of cementing white, middle class standards for determining what is acceptable and proper speech and behavior in our public schools," (PA at A28-A30), elevates a student's preference for offensive forms of expression over the compelling interests of the educational process, the rights of other students, and the societal interest of inculcating values determined by democratically elected local school boards. Surely, the far greater constitutional danger is unelected federal judges destroying the public's expectations of decency and civility in the public schools by placing offensive student speech beyond the pale of constitutionally sound disciplinary action.

The record evidences no intent by the District to suppress whatever viewpoint Fraser sought to convey in his talk. District officials reasonably believed his depiction of sexual activity to a captive audience imposed upon other students' privacy and disrupted the learning environment. The action was motivated by nothing more than the Dis-

⁴Although the record lacks credible evidence that the District had a constitutionally impermissible motive in disciplining Fraser, in cases involving "mixed motive" discipline the analysis of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-87 (1977) should be controlling.

trict's constitutionally sound interest in regulating indecent expressive activity. Because Fraser failed to make a threshold showing that the District engaged in viewpoint suppression or discrimination, and because his speech both threatened and caused a substantial disruption to the learning process, the holding that his first amendment rights were violated must be reversed.

II.

THE DISTRICT'S DISRUPTIVE CONDUCT RULE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD

The Court of Appeals affirmed the District Court's judgment that the District's disruptive conduct rule was "unconstitutionally vague, uncertain, and indefinite" under the due process clause because it failed "to define and clarify what constitutes material and substantial disruption of the educational process." PA at B8, A43 n.12. The District Court further concluded that the rule was "substantially overbroad" because it was "so drawn as to sweep within its ambit protected speech or expressions of other persons not before the court." PA at B8. Based on the unique demands of the educational process and the recognized need for flexibility in student disciplinary matters, these conclusions were in error.

The Constitution permits local school authorities considerable flexibility in student disciplinary matters. In *Goss v. Lopez*, the Court emphasized the need for an "intensely practical" application of the due process clause to student disciplinary matters. 419 U.S. at 377-78. Similarly, in *New Jersey v. T.L.O.*, the Court observed that "maintaining security and order in the schools requires a certain

degree of flexibility in disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." 105 S. Ct. at 743. See *Goss*, 419 U.S. at 582-83; *Ingraham v. Wright*, 430 U.S. at 680-82. These considerations apply alike to the determination of what constitutes fair notice to students of proscribed conduct under student disciplinary rules.

This Court's vagueness doctrine attempts to reconcile the competing interests of fair warning of proscribed conduct with the linguistic difficulty of framing limitations on conduct that may arise in an infinite variety of factual situations. *Arnett v. Kennedy*, 416 U.S. 134, 159-60 (1974). In *Kennedy*, the Court upheld a statute authorizing discipline of federal employees for "such cause as will promote the efficiency of the service. . . ." *Id.* at 158. The Court's observations concerning problems confronting public employers in drafting employee disciplinary rules apply with equal, if not greater, force to student disciplinary rules:

Because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is grounds for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal . . . in *Meehan v. Macey*, [392 F.2d 822, 835, *aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969)]:

[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catch-all' clauses pro-

hibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' . . .

416 U.S. at 161. Vagueness, therefore, must be judged in light of the particular context of the school environment. See *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972).

Concerning school disciplinary rules, most circuit courts addressing the issue have refused to hold such rules to the same due process standards for vagueness and overbreadth as criminal statutes.⁵ *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 441 (5th Cir. 1973); *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Norton v. Discipline Committee*, 419 F.2d 195 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970). As noted in *Murray v. West Baton Rouge Parish School*

⁵Several decisions have invalidated similarly worded rules applied to prohibit distribution of literature. *Hall v. Board of Commissioners*, 681 F.2d 965 (5th Cir. 1982); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975). Similarly, this Court in *Papish v. University of Missouri*, 410 U.S. 667 (1973) (per curiam) reversed disciplinary action against a university student that had distributed a newspaper on a university campus in violation of a rule prohibiting "indecent conduct or speech." *id.* at 621. These cases, however, are distinguishable. First, distributing literature is far less intrusive to privacy and disruptive to the educational process than indecent speech at a school sponsored educational activity with a captive audience. Distribution or possession of literature by students on school grounds also does not pose as great a risk of implicit school approval of the material's content, and, usually, the audience is not "captive." Second, *Papish* involved a university environment, not a secondary school. Because university students are older and presumably more mature, and because university education is not characterized by value inculcation and socialization goals, *Papish* did not address the unique first amendment considerations applicable to the secondary school environment.

Board, which involved state statutes establishing student disciplinary rules prohibiting "willful disobedience," "immoral or vicious practices," and conduct that "disturbs the school":

The statutory proscriptions at issue here are unquestionably imprecise. It is clear, however, that school disciplinary codes could not be drawn with the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording of a statute is, in fact, being used to infringe on first amendment rights . . . we must assume that school officials are acting responsibly in applying the broad statutory command.

Id. at 442 (citations and footnotes omitted).

The District's rule prohibits "conduct" that "materially and substantially interferes with the educational process," including the use of "obscene, profane language or gestures." The hearing officer on Fraser's grievance construed the term "obscene" to mean conduct or language "offensive to modesty or decency; indecent, lewd." JA at 103. In the high school context, this was a reasonable construction of the disciplinary rule and should be accepted by this Court. See *McCluskey v. Board of Education*, 458 U.S. 966, 968-69 (1982) (per curiam); *Wood v. Strickland*, 420 U.S. at 325.

More significantly, the rule was sufficient to give Fraser fair warning that a speech to the entire student body deliberately depicting sexual activity, delivered to emphasize its sexual connotations, was prohibited. There are "limitations in the English language with respect to being both specific and manageably brief." *CSC v. Letter*

Carriers, 414 U.S. 548, 578-79 (1973). Furthermore, the delicate nature of the learning environment and the school's *in loco parentis* authority in student disciplinary matters require rules against conduct that would be permissible if undertaken by adults. *T.L.O.*, 105 S. Ct. at 742-43. Given the limitations of language, the boundless creativity of school children to find new ways to disrupt the learning process, and the compelling need to maintain order in the school environment, the disruptive conduct rule as applied to Fraser was not unconstitutionally vague.

These same factors also sustain the rule against the overbreadth challenge. The rule proscribes conduct that results in a material and substantial interference with the educational process. To the extent the rule regulates "speech," i.e., "obscene" or "profane" language, it is based upon a reasonable forecast that such expressive activity will be incompatible with the educational environment. Even under *Tinker's* forecast of "disruption" standard, the rule only purports to proscribe conduct or speech "not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513.

The rule also does not permit application to protected speech because it is viewpoint neutral on its face and seeks only to further legitimate goals of the educational environment. Nothing in the rule reflects an intent to suppress ideas or single out certain viewpoints for special treatment. Instead, the rule seeks only to channel the form of student speech away from "obscene" or "profane" language because of the potentially disruptive effect. Absent evidence the District used the broad language of the disruptive conduct rule to suppress student viewpoints,

the presumption must be that the District has and will act properly in administering the rule. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d at 442.

In light of these circumstances, the disruptive conduct rule is not substantially overbroad. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court emphasized that facial overbreadth analysis is not warranted when the proscription under consideration is subject to a limiting construction and the prohibited expressive activity is within the legitimate authority of government to proscribe. *Id.* at 611-16. The District's own interpretation of its disruptive conduct rule limits its viewpoint neutral ban to speech that is within the school's constitutional authority to regulate. This regulation of offensive student speech, moreover, is more akin to the regulation of conduct, not "pure speech," because of the deleterious effect such expressive activity has in the school environment. *See id.* at 615-16. Any potential overbreadth in the District's disruptive conduct rule, therefore, is neither real nor substantial when judged against its legitimate sweep. *Id.*

Most significantly, stringent application of the vagueness and overbreadth doctrine is incompatible with the school environment. Both the District Court's oral opinion and the majority in the Ninth Circuit intimated that to prohibit sexually suggestive speech, school disciplinary rules must define specifically the types of language or conduct prohibited in the same manner as criminal statutes prohibiting the dissemination of obscene materials. PA at A23 n.5, B-18-B19. *See Miller v. California*, 413 U.S. 15, 23 (1973) (requiring specific definition of sexual conduct in criminal obscenity statute). This standard,

however, equates the constitutional interests at stake when school authorities regulate student speech at school with those of the state when it prosecutes pornographers. A specific description of prohibited language or activity in a student rule book would (1) set an inflexible standard unduly limiting schools officials' discretion; (2) tempt students to engage in otherwise offensive, but undefined, expressive activity; and (3) convey information considered offensive and shocking in itself to many students and parents. Even a casual perusal of criminal statutes considered by this Court demonstrates that requiring specific definitions of indecent language or conduct to appear in school disciplinary rules would be unworkable. *E.g.*, *Ginsberg*, 390 U.S. at 645-46.

Finally, a rigid application of both vagueness and overbreadth standards to school disciplinary rules would thwart the ability of parents, professional educators, and elected school boards to develop a consensus on school disciplinary matters. In the Bethel School District, like many other districts across the country, school disciplinary rules must be developed with substantial input from parents and the community, subject to the board of directors' control. Wash. Rev. Code § 28A.58.1011 (1983); Wash. Admin. Code R. 180-40-225 (1983). Interjecting criminal law standards of specificity into the drafting of these rules would thwart this process of community development of educational policy, as well as the flexibility needed to administer discipline as an educational tool. Given these institutional needs of the educational process, the disruptive conduct rule is neither unconstitutionally vague nor substantially overbroad.

III.

**THE DISTRICT DID NOT VIOLATE FRASER'S
RIGHTS UNDER THE DUE PROCESS CLAUSE BY
FAILING TO DEFINE EACH FORM OF
DISCIPLINARY ACTION THAT COULD BE IMPOSED**

The District Court held that the removal of Fraser's name as a candidate for graduation speaker violated his due process rights under the fourteenth amendment, apparently because the District's disciplinary rules did not specify such action as a potential form of punishment. PA at B9, B23.⁶ This holding, however, was in error for the same reasons that sustain the District's disruptive conduct rule against vagueness and overbreadth challenge.

School disciplinary rules need only place students on reasonable notice that certain types of general conduct are prohibited within the confines of the school environment. The Bethel High School Student Handbook informs students that commission of acts defined as disciplinary offenses, including the school's disruptive conduct rule, may result in "[d]isciplinary action, including suspension and up to expulsion" Def.'s Ex. B, p.6. JA at 58-59. Furthermore, the Washington State Board of Education's

⁶Because Fraser did speak at the graduation ceremony in 1983, the Court of Appeals correctly vacated the District Court's injunction requiring the District to make him a graduation speaker as moot. Nonetheless, this question, along with the remaining questions accepted for review, is not moot because Fraser's complaint sought monetary damages for violation of his civil rights and the trial court awarded him damages in the amount of \$278.00. JA at 3-12; PA at C4-C5. Both Fraser and the District, therefore, have a personal stake in the outcome of this litigation that remains "live" on appeal. *Powell v. McCormick*, 395 U.S. 486 (1969) (challenge to exclusion from the House of Representatives not moot after the plaintiff was seated because of claim for withheld salary).

regulations concerning disciplinary rules for school districts, under which the District's disciplinary rules were adopted, define "discipline" as "all forms of corrective action or punishment, other than suspension and expulsion" and further specify that "discipline shall also mean the exclusion of a student from any other type of activity conducted by or in behalf of a school district." Wash. Admin. Code R. 180-40-205(1) (1983). Finally, the state's administrative rules grant students and their parents or guardians the right to grieve any disciplinary action to the building principal, and to appeal an adverse decision of the principal to the school board. Wash. Admin. Code R. 180-40-240 (1983).

In the school environment, this definition of "discipline" and the procedural safeguards afforded by the grievance review process satisfy due process requirements. In *Ingraham v. Wright*, the Court rejected a due process challenge to school corporal punishment partially because of the practical difficulties involved in requiring extensive hearing rights prior to punishment. 430 U.S. at 680-82. Those same considerations apply to specified written penalties for disciplinary offenses. Such a universal constitutional requirement governing teacher disciplinary practices would not only impose a substantial additional burden on educators, but also deprive them of discretion to tailor punishment according to individualized circumstances. An effective punishment for one student may be disastrous for another. Given the infinite variety of circumstances in which the need for discipline may arise, a due process requirement that each punishment for a school offense be set out in writing would thwart the recognized need for immediate and effective disciplinary action and

usurp the discretion of school authorities to choose appropriate means of maintaining order in the school. *Id.*; *Goss v. Lopez*, 419 U.S. at 580.

The existing procedural safeguards under Washington law are sufficient to protect a child's interest in knowing what forms of corrective action may be imposed. Wash. Admin. Code R. 180-40-240 (1983). Even assuming the District's removal of Fraser's name from the list of graduation speakers implicated constitutionally protected property or liberty interests, the right to grieve the disciplinary action was a sufficient safeguard against arbitrary punishment. Because school rules identifying each form of potential punishment for student offenses are neither educationally desirable nor practical, and because adequate procedural safeguards exist to review disciplinary actions under state law, the judgment should be reversed.

IV.

THE DISTRICT COURT ERRED IN RAISING AND DECIDING STATE LAW ISSUES SUA SPONTE

The District Court also concluded that the District's three-day suspension of Fraser violated certain provisions of the Washington Administrative Code. PA at B9. Because the District Court raised the issue in a manner that substantially prejudiced the District, and because pending jurisdiction over the state law issue should not have been entertained, reversal on abuse of discretion grounds is necessary. In addition, the District Court's determination of the state law issue was erroneous.

The District had no opportunity to respond to the trial judge's *sua sponte* decision on the state law issue.

Fraser's complaint was confined to federal constitutional and civil rights claims. JA at 3-12. During the trial, neither party expressly nor impliedly consented to resolution of this issue. Indeed, the District's first notice that the trial judge would decide the issue came after the hearing when the District Court entered its findings of fact and conclusions of law and thus precluded the District from any meaningful opportunity to respond or even request a continuance. By analogy to Rule 15(b) of the Federal Rules of Civil Procedure, these actions by the trial court substantially prejudiced the District and were an abuse of discretion. See *Cook v. City of Price*, 566 F.2d 699, 702 (10th Cir. 1977); *Deakynne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969). 3 J. Moore, *Moore's Federal Practice* ¶ 15.13[2] (2d ed. 1983) (citing cases).

The District Court's decision to exercise pendent jurisdiction was also an abuse of discretion. The pendent jurisdiction doctrine rests on discretionary principles. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Even when a federal court has the power to assert pendent jurisdiction, the circumstances of the claim, including fairness to the litigants and considerations of comity, public policy, and federal-state relationships must be addressed. *Id.* at 726-27; *Hagans v. Lavine*, 415 U.S. 528, 545-49 (1974).

In the area of student first amendment rights and school discipline, this Court has repeatedly stressed the need for the federal judiciary to refrain from needless interference in the day-to-day operation of the public schools. See sections I and II *supra*. The issue decided *sua sponte* by the District Court was limited to a state

regulation concerning student suspensions. It was wholly unrelated to enforcement of Fraser's alleged first amendment and due process claims, and implicated educational policy issues of unique concern to state and local authorities. Even in federal civil rights litigation, federal courts are not the appropriate forum to review state law issues affecting sensitive topics of public school management. *Wood v. Strickland*, 420 U.S. at 326. See also *Berns v. Civil Service Commission*, 537 F.2d 714, 717 (2d Cir. 1976) (reversing exercise of pendent jurisdiction over state civil service law issue); *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976) (upholding district court refusal to decide state law issues concerning non-renewal of teacher contract). Under these circumstances, the *sua sponte* exercise of pendent jurisdiction was an abuse of the trial court's discretion.

Finally, the District Court's substantive determination of the state law issue was in error. Although the District was precluded from any opportunity to introduce evidence on this issue, the decision of its hearing officer fully addressed the question of the District's compliance with the rule at issue. Wash. Admin. Code R. 180-40-245(2) (1983). The rule provides in pertinent part that no short-term suspension may be imposed upon a student "unless other forms of corrective action or punishment reasonably calculated to modify his . . . conduct have failed, or unless there is good reason to believe that other forms of corrective action or punishment would fail if employed."

The hearing officer concluded that "[b]ased upon prior warning given to Matt Fraser concerning delivery of his speech, imposition of a short-term suspension and

discipline was justified because the District had good reason to believe that other forms of corrective action or punishment would fail if employed." JA at 104. Fraser's response to the discipline was that he had done nothing warranting punishment. His attitude justified the District's belief that a less severe form of punishment than a three-day suspension would not correct his behavior.

The District Court's reliance on *Quinlan v. University Place School District*, 35 Wash. App. 260, 660 P.2d 329 (Wash. Ct. App. 1983), was also misplaced. *Quinlan* held only that school district rules could not establish a predetermined suspension penalty because the state board's rules require assessment of the individual student's circumstances in every suspension action. The District did not rely on any predetermined penalty rule in punishing Fraser and assessed his individual circumstances. JA at 102, 104. Accordingly, even if the District Court properly reached the state law issue, it must nonetheless be reversed on the merits.

 o

V.

CONCLUSION

For the reasons stated above, the District respectfully urges the Court to reverse and vacate the judgments of the Ninth Circuit Court of Appeals and the trial court, including the award of monetary damages, declaratory relief, attorneys' fees and costs, and remand the case to the

District Court with instructions to enter an order of dismissal with prejudice. In the alternative, the District requests reversal and vacation of the judgments, and an order of remand for further proceedings consistent with appropriate constitutional law standards.

KANE, VANDEBERG, HARTINGER
& WALKER

WILLIAM A. COATS
Counsel of Record

CLIFFORD D. FOSTER, JR.
Of Attorneys for Petitioners

No. 84-1667

Supreme Court, U.S.

FILED

JAN 19 1985

JOSEPH P. MOULDER, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1984

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B.
INGLE; DAVID C. RICH; J. BRUCE ALEXANDER;
AND GERALD E. HOSMAN,

Petitioners,

vs.

MATTHEW N. FRASER, A MINOR, AND E. L. FRA-
SER, AS HIS GUARDIAN AD LITEM,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF OF RESPONDENTS

SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY
2525 First Interstate Center
Seattle, WA 98104
Telephone: (206) 382-2600

By: JEFFREY T. HALEY
Counsel of Record

CHARLES S. SIMS
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
Telephone: (212) 944-9800

Attorneys for Respondents

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. Fraser's speech is protected by the First Amend- ment	9
A. Previous First Amendment decisions leave Fraser's speech clearly protected	9
1. Fraser's speech did not materially and substantially disrupt the educational proc- ess	11
2. Punishment of Fraser was not required to dispel any impression of approval by school officials	15
3. Current First Amendment doctrine does not allow prohibition of mere sexual met- aphor in student speech	17
B. The Court should not establish a new excep- tion to the First Amendment in this case.....	21
1. The First Amendment must apply in the schools to ensure the protection of free speech values	22
2. Even if a new exception were appropriate for some settings, it should not extend to presentation of political speeches by stu- dents	26
3. The sexual metaphors at issue here pose no real threat of harm to senior high school students	28
4. Prohibition of this "indecent" speech is not viewpoint neutral.....	30

TABLE OF CONTENTS—Continued

	Page
5. The proposed exception would not have sufficiently clear standards	31
6. For constitutional purposes, this case does not involve a captive audience	34
7. This case does not involve the state interest in controlling the presentation of information on sexuality to children.....	35
8. The need for local control over school rules does not justify the proposed exception	36
II. The Disruptive Conduct rule used to punish Fraser is overbroad as construed, violating rights of free speech, and unconstitutionally vague as applied, violating rights of due process	36
A. As applied, the disruptive conduct rule is unconstitutionally vague	36
B. As construed, the disruptive conduct rule is overbroad in that it prohibits speech which is protected by the First Amendment	40
III. Petitioners' additional claims are either moot or inappropriate for resolution here	41
CONCLUSION	43
ADDENDUM	App. 1

TABLE OF AUTHORITIES

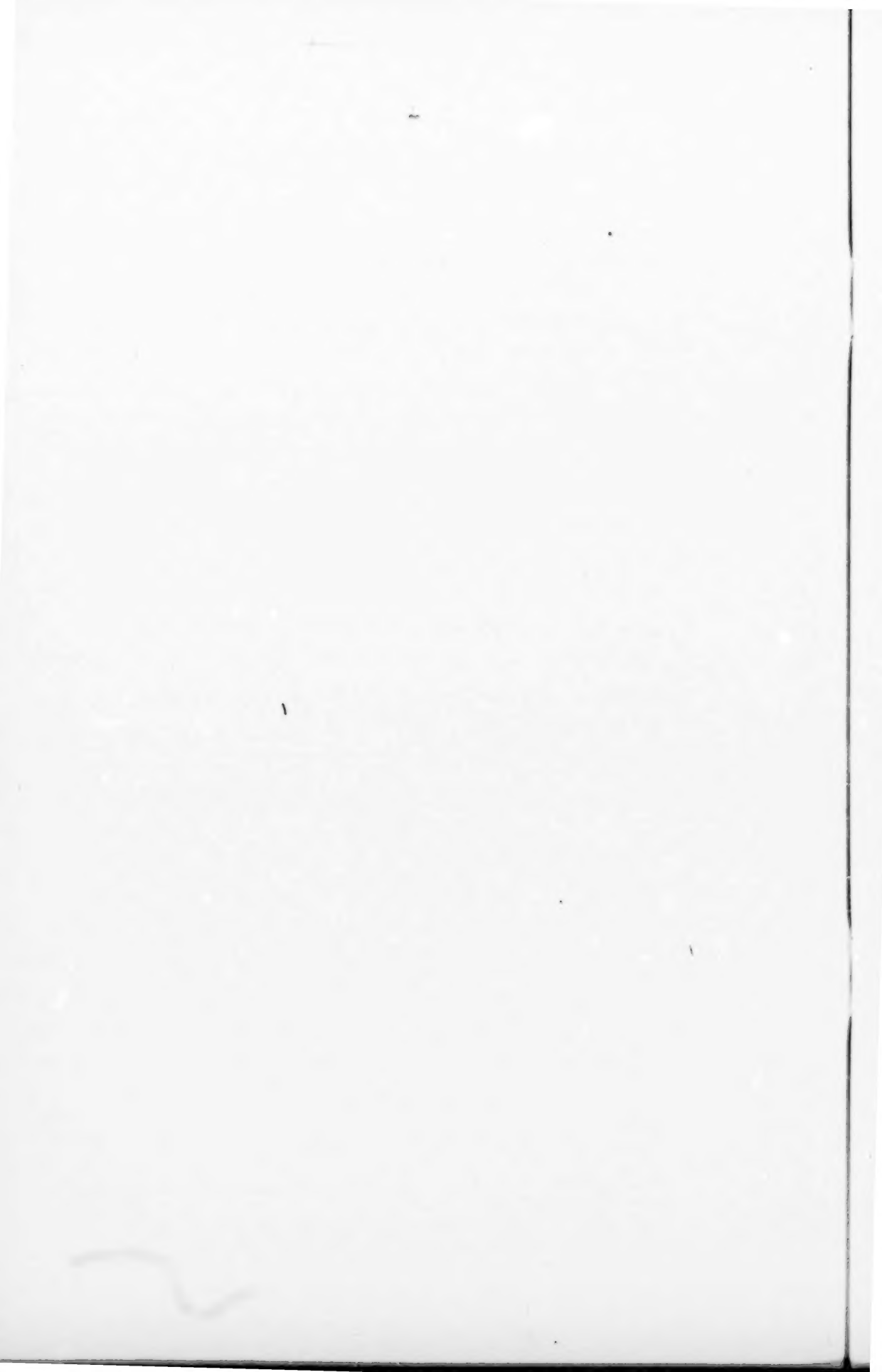
	Pages
CASES:	
Adikes v. Kress & Co., 398 U.S. 144 ()	42
Arnett v. Kennedy, 416 U.S. 134 (1974)	37
Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973)	16, 20
Bender v. Williamsport Area School District, (U.S. No. 84-773) (October 12, 1985)	16, 28
Bishop v. Committee on Professional Ethics, 686 F.2d 1278 (8th Cir. 1982)	42
Blackwell v. Issaquena County Board of Educa- tion, 363 F.2d 749 (5th Cir. 1966)	22
Board of Education v. Pico, 457 U.S. 853 (1982)	26
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984)	14
Brandenburg v. Ohio, 395 U.S. 444 (1969)	10
Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)	22
Cantwell v. Connecticut ()	12
Chaplinski v. New Hampshire, 315 U.S. 568 (1942)	10, 22, 32
Cohen v. California, 403 U.S. 15 (1971)	10, 12, 32, 34
Cornelius v. NAACP Legal Defense and Educa- tion Fund, — U.S. — , 105 S.Ct. 3439 (1985)	27
Cox v. Louisiana, 379 U.S. 599 (1965)	40
Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980)	42
Edwards v. South Carolina, 372 U.S. 229 (1963)	12
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	19, 39
Frasca v. Anders, 463 F.Supp. 1043 (E.D.N.Y. 1979)	20
Gambino v. Fairfax County School Board, 429 F.Supp. 731 (1977), affirmed per curiam 564 F.2d 157 (1977)	20
Ginsberg v. State of New York, 390 U.S. 629 (1968)	10, 18

TABLE OF AUTHORITIES—Continued

	Pages
Goss v. Lopez, 419 U.S. 565 (1975)	37
Jacobs v. Board of Commissioners of City of Indianapolis, 490 F.2d 601 (7th Cir. 1973), dismissed as moot, 420 U.S. 128 (1975)	20
Keyishhian v. Board of Regents of New York, 385 U.S. 589 (1967)	37
Kois v. Wisconsin, 408 U.S. 229 (1972)	20
Kolendar v. Lawson, — — — (—)	38
Koppel v. Levine, 347 F. Supp. 460 (E.D.N.Y. 1972)	16, 20
Labor Board v. Sears, Roebuck & Co., 421 U.S. 132 (—)	42
Lovell v. Griffin, 303 U.S. 444 (1944)	38
Miller v. California, 413 U.S. 15 (1973)	10, 32
Miller v. Fenton, 54 U.S.L.W. 4022 (December 3, 1985)	14
New Jersey v. T.L.O., 469 U.S. —, 105 S.Ct. 733 (1985)	6, 37
Nicholson v. Board of Education, 682 F.2d 858 (9th Cir. 1982)	15
Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667 (1973)	20
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)	27
Procunier v. Martinez, 416 U.S. 396 (1974)	42
Ramsey v. United Mine Workers, 401 U.S. 302 ()	42
Roth v. United States, 354 U.S. 476 (1957)	10
Seyfried v. Walton, 688 F.2d 214 (3d Cir. 1981)	10, 15
Seoville v. Board of Education of Joliet Township, 425 F.2d 10 (7th Cir. 1970)	20

TABLE OF AUTHORITIES—Continued

	Pages
Street v. New York, 394 U.S. 576 (1969)	12
Sullivan v. Houston Independent High School District, 333 F.Supp. 1149 (S.D. Tex. 1971)	20
Thomas v. Board of Ed. Granville Cent. Sch. Dist., 607 F.2d 1043 (2nd Cir. 1979)	15, 20
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 10, 11, 12, 14, 21, 22, 31	
Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977).....	10
United States v. Pennsylvania Industrial Chemical Corporation, 441 U.S. 665 (1978)	40
Vail v. Board of Education of Portsmouth School District, 354 F.Supp. 592 (D.N.H. 1973)	20
Vance v. Universal Amusement Co., 445 U.S. 308 (1980)	42
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	16
Widmar v. Vincent, 454 U.S. 263 (1981)	28
Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980)	42
 OTHER AUTHORITIES:	
Equal Access Act, Pub. L. 98-377, Title VIII, 98 Stat. 1302	26
Random House Dictionary	38
Stern and Gressman, <i>Supreme Court Practice</i> (1978) 282-84	43
Washington Administrative Code § 180-40-215 (1983)	23
Webster's Seventh New Collegiate Dictionary 582 (1966)	38



STATEMENT OF THE CASE

In the Spring of 1983, Matthew Fraser was nearing graduation from Bethel High School. He was a member of the Honor Society and the Debate Team. He had been judged Top Speaker in state-wide debate competition both his junior and senior years and had won a leadership contest within the school. He was known among the students as an outspoken critic of the school administration both orally and in the student press. He had never been cited with a violation of school rules.¹

As in most high schools, the student government conducted elections near the end of each year to choose officers for the coming year. Jeff Kuhlman, a candidate for vice-president asked Matt Fraser to give a nomination speech at a voluntary school assembly conducted by the student government for this purpose. With his audience clearly in mind, Matt Fraser composed the following speech, which included sexual metaphor aimed at those students who would choose to hear it:²

I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds.

1. JA 45, 49, 51, 55, 64; Transcript 54; Petition B-29; Complaint ¶ 37, JA 10-11.

2. JA 46.

Jeff is a man who will go to the very end, even the climax, for each and every one of you.

So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

Before presenting the speech, Fraser sought critical comments from the candidate, a few other students, and three teachers. Although two of the teachers recommended that he refrain from presenting the speech, none directed him to refrain, none suggested that its delivery might violate school rules, and none took any action to block its presentation. As agents for the administration, teachers are requested to enforce school rules and take action to avert impending violations. However, it did not occur to the teachers that presentation of this speech might violate the Disruptive Conduct rule.³

Although two teachers suggested that the speech was inappropriate for presentation at school, Fraser knew that two other students who had presented similar speeches in the past had not been charged with violations of school rules. At the same nominating assembly one year earlier, a student presented a speech containing a sexual reference and a four-letter word usually considered offensive. School officials responded only with more speech and did not impose any punishment.⁴ Also a year earlier, another student published a creative essay in the school's literary magazine describing in detail, through metaphor and allusion, the conquest by a male, "by establishing a false sense

3. JA 30, 32, 50, 62, 89.

4. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

of security", of a female "enemy", including sexual intercourse. This essay is reproduced in the Joint Appendix at 13-14. The author was not disciplined and was a speaker at his graduation soon thereafter.⁵

At the assembly, Fraser's stride to the podium was accompanied by yelling and boisterous activity typical of nominating assemblies for student politics. Although his speech was punctuated by considerable applause and yelling, some of the students looked bewildered at certain points and seemed not to understand why others were applauding. The student government officer in charge of the meeting had no difficulty maintaining order and the succeeding speech was presented without delay.⁶ Jeff Kuhlman won the election.⁷

The following morning, Matt Fraser was summoned to the office and presented with copies of five letters solicited from teachers by the Assistant Principal describing the speech and the assembly.⁸ Based on the information in the letters, he was charged with violating the school's "Disruptive Conduct" rule which states:

Disruptive Conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The Assistant Principal told Fraser that, because the sexual message was apparently intended, the speech was

5. Complaint an Answer ¶ 22, JA 7, 22.

6. JA 27-28, 35, 50.

7. JA 50.

8. JA 52, 67.

obscene within the meaning of the Disruptive Conduct rule and therefore a violation of that rule.⁹

Fraser was informed that he was suspended for three days and that his name would be removed from a list of eligible students to appear on the ballot for graduation speakers.¹⁰ He had been specifically approved as a potential graduation speaker by school officials and a committee of students about three hours before he gave his fateful speech.¹¹

Upon learning that Fraser was suspended and banned from speaking at graduation, several students posted placards in support of Fraser containing sexual innuendo such as "Don't Be Hard On Matt" and "Stand Firm Matt." These students were not disciplined.¹²

Fraser believed that he was punished for presentation of his speech, even though other students who presented more sexually explicit or offensive speeches were not, because certain school officials wanted to curb student criticism of the administration. He felt that, as a result of his accusing certain officials of improprieties, both verbally before other students and in the student press, the officials were looking for an opportunity to discipline him. This was the last chance before his graduation.¹³

Believing that his rights to freedom of speech had been violated, Fraser contacted an attorney who persuad-

9. JA 67-68.

10. JA 52.

11. JA 53, 70-71, 85-86.

12. Complaint an Answer ¶ 23, JA 8, 23.

13. JA 51; Transcript 54; Complaint ¶ 37, JA 10-11.

ed the school officials to reduce the suspension from three days to two.¹⁴ To give the School District a chance to modify the decision before a legal action was filed, Fraser's attorney filed a Request for Grievance Review with the School District administrative offices, a copy of which is reproduced in the Joint Appendix at 15-19. The District chose to support its subordinate officials.¹⁵ Fraser then filed in federal court a detailed complaint which is reproduced in the Joint Appendix at 3-19.

Before the first appearance in federal court, the school officials conducted the election for graduation speakers using a ballot which omitted Fraser's name. Nevertheless, Fraser received enough write-in votes to be elected as a graduation speaker. The school officials still maintained that he would not be allowed to speak at graduation.¹⁶

The trial was conducted before graduation and the court entered an injunction allowing Fraser to speak at graduation, which he did without incident. The court entered written findings and conclusions which are reproduced in the Petition at B-1 to B-10.

Although the court did not rule on all of the constitutional arguments raised by Fraser,¹⁷ it ruled in his favor on three constitutional grounds and one separate state law ground. The court awarded \$278 damages for the two days of education that were denied, as well as costs and attorney fees of \$12,750.

14. JA 54, 86.

15. JA 105.

16. JA 59, 72.

17. E.g., Complaint ¶¶ 36, 37, 41, 42.

The Court of Appeals considered only two of the constitutional grounds and upheld the district court on both. In their Petition for Certiorari, the school officials have challenged all four grounds relied upon by the district court.

SUMMARY OF ARGUMENT

This case involves punishment of a student for delivering a speech containing sexual metaphors and puns to a high school political assembly. It does not involve behavior.¹⁸ It does not involve obscenity or the use of offensive words. It does not involve disrespect toward teachers or other students.¹⁹ It does not involve the maintenance of order or discipline within the school.²⁰ Nor does it involve speech which is reasonably likely to disturb the harmony of the educational setting, such as racial slurs.²¹

Rather, this case involves, solely, the propriety of using a sexual metaphor or pun as a rhetorical device in student political speech. The use of sexual metaphors

18. The school rule in this case does not relate to regulation of the length of skirts, type of clothing, hair style, or deportment. Cf. U.S. Br. 11.

19. Cf. U.S. Br. 8, 19; Brief of Texas Council of School Attorneys 9.

20. By contrast, *New Jersey v. T.L.O.*, 469 U.S. —, 105 S.Ct. 733 (1985), involved enforcement of school rules related to drug use and violent crime. See *T.L.O.* at 105 S.Ct. 742. Cf. Brief of Texas Council of School Attorneys 9.

21. Cf. U.S. Br. 8, 18-19.

or puns is common in the everyday speech of both adolescents and adults. Sexual puns or metaphors are common in the classics of our literature (such as *Romeo and Juliet* and *Moby Dick*, see Addendum) which are taught in every high school in the land. Sexual puns and metaphors are frequently heard on radio and television. While school authorities are free to voice their displeasure with the use of sexual imagery by criticizing its use, they may not suspend a student merely because he steals a page from William Shakespeare and coins a sexual pun in a political speech.

It is, of course, one of the missions of education to inculcate the fundamental values of our society. In carrying out that sensitive task, however, educators must recognize that they are preparing students for life in a democracy in which freedom of expression is a fundamental value. In their zeal to impose on teen-agers Victorian canons of taste, which are not—and never have been—adhered to by any sizeable segment of our society, the petitioners inadvertently would teach an ugly lesson—that those in power can suppress the expression of those with whom they disagree. As required by freedom of speech principles for our larger society, those who disagree with student speech presented in a political assembly, including school officials, may of course respond with more speech, including sharp criticism or ridicule. But they may not use the power of their office to punish the speaker.

Under established jurisprudence, all speech is presumed protected by the First Amendment unless it falls within an identified exception. No federal court has yet identified an exception to the First Amendment which

would allow the allusive speech in this case to be prohibited. Even if a new exception for some speech in the high schools might be appropriate, it should not be established in this case. Such an exception should not include speeches delivered in the course of student politics, and it should not extend to mere sexual metaphor already widely present in the culture and indeed, the curriculum.

Nor would such a proposed exception be sufficiently precise to meet constitutional scrutiny in the area of free speech. Although schools are not required to draft their rules with the same precision as criminal statutes, both courts below were correct in ruling that the rule in this case, as construed after the fact, is unconstitutionally vague, violating rights to due process, and substantially overbroad, violating rights of free speech. Fair warning is simply not afforded where pure speech, which is neither obscene nor profane and is delivered at a student assembly convened for the purpose, is punished under a rule barring "[c]onduct which materially and substantially interferes with the educational process . . . , including the use of obscene, profane language or gestures". In effect, the general exception to the First Amendment sought by petitioners is an open-ended power to ban speech merely because it appears "inappropriate" to someone in authority. Such a subjective standard of censorship cannot withstand First Amendment analysis.

ARGUMENT

I. Fraser's speech is protected by the First Amendment.

A. Previous First Amendment decisions leave Fraser's speech clearly protected.

This case involves an attempt to punish pure speech, not because it involved offensive or "dirty" words, but solely because its political message was marked by a modest sexual allusion appealing to an adolescent sense of humor. The student employed a timeworn rhetorical device—functionally and structurally indistinguishable from countless similar examples in the history of literature and politics²²—to engage his audience in laughter and thereby make his point memorable. Off the school grounds, the speech would certainly be protected. The substantive First Amendment question presented is whether, under the facts of this case, school officials can punish the use of such a rhetorical device to dramatize a speaker's support for a candidate for student government.²³

Speech is removed from the protection of the First Amendment only if it falls within a clearly defined exception to freedom of speech and is prohibited by a narrowly drawn regulation supported by a compelling state inter-

22. See Addendum.

23. The case also presents a question whether such allusions can be punished, consistent with the vagueness doctrine, under a rule proscribing "obscene, profane language." See Point II, *infra*.

est.²⁴ Three exceptions have been identified by the courts which are relevant to the consideration of this case.

First, *Tinker v. Des Moines Independent Community School District*²⁵ made it clear that school officials may prohibit and punish speech in schools which causes or threatens a material and substantial disruption of the educational process.

Second, some opinions of the courts of appeals suggest that school officials may censor certain speech that gives the impression that it carries the imprimatur of school authorities.²⁶

Third, obscene speech is not protected by the constitution.²⁷ *Miller v. California*²⁸ established the appropriate test for obscenity, and *Ginsburg v. State of New York*²⁹ made it clear that this test varies according to the age of

-
24. *Cohen v. California*, 403 U.S. 20 (1971); *Roth v. United States*, 354 U.S. 476 (1957) (obscene expression not protected); *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942) (fighting words not protected); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (expression which materially interferes with educational process not protected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (expression inciting imminent lawless action not protected).
 25. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
 26. *Seyfried v. Walton*, 688 F.2d 214 (3rd Cir. 1981) (officials may censor school play), *Trachtman v. Anker*, 563 F.2d 512, 516 (2d Cir. 1977), cert. den. 435 U.S. 925 (distribution of sexually explicit questionnaire in school).
 27. *Roth v. United States*, 354 U.S. 476 (1957).
 28. *Miller v. California*, 413 U.S. 15 (1972).
 29. *Ginsburg v. State of New York*, 390 U.S. 629 (1968).

the audience. Speech which is not obscene for adults might nevertheless be prohibited for children.

None of the three identified exceptions to the First Amendment apply to the humorous rhetorical device employed by Matt Fraser.

1. Fraser's speech did not materially and substantially disrupt the educational process.

Neither the petitioners nor the United States seriously contend that the *Tinker* standard was met here, and the findings of both courts below that there was no material disruption of class work, no substantial disorder, and no invasion of the rights of others, are plainly correct.

During the afternoon and the morning immediately following Fraser's speech, school officials solicited and collected five letters from teachers concerning Fraser's speech which are reprinted in the Joint Appendix at 94-99. These letters were presented to Fraser as notice of the charges against him when he appeared at the vice principal's office the morning after the speech. None of the letters mentioned disruption or described any facts which could be fairly characterized as a disruption of the educational process. Three of the letters suggested the speech was "profane" or "inappropriate"; a fourth letter, at 97-98, found nothing offensive about it; and the fifth, at 95, offered no comment.

The trial judge, acting as finder of fact, concluded that this speech did not cause a constitutionally relevant disruption of the educational process. Petition B-31 to

B-33. Based upon a *de novo* review of the record,³⁰ the Court of Appeals fully agreed: "the record now, before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School." Petition A-17. Even the dissent below did not conclude that the speech caused a material and substantial disruption. Petition A-61 to A-63.³¹

That three students in the audience of 600 reacted with sexually suggestive movements does not justify the conclusion that Fraser's speech created sufficient disruption to allow its punishment. Pet. Br. 19. The freedom of speech recognized by *Tinker* would be meaningless if any student speaker could be punished merely because a few members of a large audience respond with distasteful symbolic speech.³² Indeed, the audience's reaction here was less than would greet the showing of most movies teenagers watch.

Similarly, the speech was not materially disruptive because, as the trial court summarized a teacher's testimony, "[o]n the day after the speech was delivered, a

30. Petition A-10 note 2.

31. The dissent felt that the majority took "an overly constrained view of what constitutes 'substantial disruption'" and felt that courts should not be quick to second-guess school authorities. The dissent did not disagree that a "substantial disruption" had not been shown here. Petition A-60 to A-63.

32. For other cases where audience reaction was held insufficient to prohibit or punish speech, see *Street v. New York*, 394 U.S. 576, 592 (1969); *Cohen v. California*, 403 U.S. 15 (1971); *Edwards v. South Carolina*, 372 U.S. 229, 232-33 (1963); *Cantwell v. Connecticut*, — — — — — (— —).

teacher found that students in her class were more interested in discussing the speech than attending to class work. The teacher then invited a class discussion of the speech." Petition B-3.³³ Presumably, the teacher recognized that any recent event can provide the spark of education. There is no evidence in the record suggesting that the speech engendered, even in this class, an atmosphere of irresponsibility or educational disorder.

Nor does the petitioners' claim that the ideas or images contained within the speech were disruptive to the educational processes going on within the minds of students have merit. Pet. Br. 19, 27. In effect, the petitioners are arguing that they may censor or punish, not particular dirty words as Fraser uttered none, but certain ideas and images being presented to students with sexual connotations. They seem to fear that once such pernicious ideas are planted in the minds of students, no amount of additional speech or reason will be able to counter their effects. But, it is inconceivable that Fraser could, in his three minute speech, cause such a pernicious effect upon the minds of other students that adult teachers could not effectively counteract it with more speech. In addition, schools do not generally attempt to ban allusions such as Fraser's from students' minds. The allusion here is indistinguish-

33. Furthermore, it is inappropriate for the school district to rely upon this incident as evidence to justify the punishment because it occurred after the school officials notified Fraser of his violation, gave him an opportunity for rebuttal, and imposed punishment.

able in content from those common in Shakespeare and other literature commonly taught to high school students.³⁴

Fraser concedes that the "disruption" described in *Tinker* need not be physical. But it must be based on more than an unsubstantiated, amorphous, conclusory characterization of the effect of the content of the speech on the minds of students.

The United States suggests that the courts need not independently assess disruption because the school itself found it. U.S. Br. at 24. But the *Tinker* standard, like all constitutional standards, inevitably requires judicial application in the final analysis.³⁵ If the school can call whatever it chooses "disruption" within the meaning of *Tinker*, then *Tinker* means whatever the school says it means. That is not, of course, the law.

Even assuming that the school's assessment is entitled to substantial weight, it cannot be sustained in this case. The rule as applied defines "obscene, profane language" as disruptive before the fact, notwithstanding the particular speech or circumstances involved. It was applied not to language at all (much less obscene, profane language) but rather to ideas contained in quite decent language. Under this view, a student who reads aloud the parts of *Romeo and Juliet* or *Moby Dick* which are reproduced in the Addendum, or any other literature with sexual metaphors, could constitutionally be punished. Both

34. See Addendum.

35. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Miller v. Fenton*, 54 U.S.L.W. 4022 (December 3, 1985).

courts below were plainly correct in rejecting such a conclusion and in holding that Fraser's speech was not disruptive in a constitutional sense.

2. Punishment of Fraser was not required to dispel any impression of approval by school officials.

Petitioners contend that school officials must have some latitude to dispel the impression that the school has authorized or approves of the speech. Pet. Br. 25. For the purposes of this case, Fraser need not disagree. Courts which have accepted this contention have applied it to speech generated as a part of the curriculum, such as newspapers produced in a journalism class³⁶ and school sponsored plays.³⁷ By contrast, student newspapers which are produced outside of the curriculum and do not create the impression that they are sponsored by school authorities are outside of this exception.³⁸ Where, as here, there is no impression that the school approved of or authorized the speech, or any such impression can be effectively dispelled by presenting more speech in the nature of disclaimers and repudiations, censorship and prohibition are

36. *Nicholson v. Board of Education*, 682 F.2d 858, 863 (9th Cir. 1982).

37. *Seyfried v. Walton*, 668 F.2d 214 (3rd Cir. 1981).

38. *Thomas v. Board of Ed. Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2nd Cir. 1979) (school administrators could not punish students for publication of a newspaper which was produced and sold off school grounds and allegedly contained morally offensive, indecent, and obscene content).

not allowed because alternatives are available that are less restrictive of freedom of speech.³⁹

The petitioners' claim that there was "a substantial risk that impressionable students (or parents) would perceive Fraser's [speech] as authorized absent disciplinary action", Pet. Br. 25, is untenable for two reasons.⁴⁰

First, there is no activity on school grounds where the content of student speech is more disassociated from the educational program established by school authorities than student politics. The presumption by anyone who is remotely familiar with American concepts of democracy, including both impressionable students and their parents, is that the content of student political speech is developed by students for students. Within student politics, the common adversary is the school administration. The predictable expectation is hardly that student electioneering speech is the voice of school policy.

39. When the state has an important interest that conflicts with First Amendment protections, the state must, where there are alternatives, select the means of achieving its interest that is least restrictive of First Amendment rights. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). Two federal courts, while not allowing censorship or punishment for "vulgarity", allowed school officials to satisfy their asserted interest in dispelling the impression of approval of objectionable publications by attaching a disclaimer. *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973), cert. den., 416 U.S. 995 (1974) and *Koppel v. Levine*, 347 F. Supp. 460 (E.D.N.Y. 1972).

40. Fraser's position that the punishment was not required to dispel impressions of official approval is supported by the United States in its amicus brief in *Bender v. Williamsport Area School District* (No. 84-773), argued (October 12, 1985), where the Solicitor General agreed that "high school students are mature enough to discern" "the difference between official endorsement and mere permission." U.S. Br. 23, 22.

Second, the school can quite easily present additional speech, to the students at an assembly or to the students and their parents in writing, repudiating and condemning the content of the speech. School authorities certainly control adequate means to communicate their message. The message might include a comment that the speech is protected by the First Amendment. Such a response would be educational for all of the students because it would demonstrate the battle of ideas contemplated by the principles of freedom of speech.

3. Current First Amendment doctrine does not allow prohibition of mere sexual metaphor in student speech.

A review of the record in this case shows that the teachers and school officials objected to this speech only because, in their view, it was "inappropriate", "indecent", "lewd", and "profane". See the letters from teachers regarding Frasers speech in the Joint Appendix (JA) at 94-99. Thus, the employee of the school district⁴¹ who reviewed the matter at Fraser's request, stated: "The speech Matt delivered conveyed a sexual meaning that was indecent, lewd, and offensive to the modesty and de-

⁴¹ In their briefs, the petitioners and the United States make various references to the findings and conclusions of the school district employee who reviewed the case. E.g. Pet. Br. 3-5, 32; U.S. Br. 23. But, the school district's hearing officer was an employee of the district and in no sense a neutral third party. His findings and conclusions are entitled to no greater weight than the petitioners' pleadings. Even though he was not required to do so, Fraser filed a grievance with the school district to give the district a chance to reverse its decision before being compelled to appear in court.

cency of many of the students and faculty in attendance at the assembly." JA 102 ¶ 9. He concluded "Matt Fraser's speech was obscene within the meaning of the disruptive conduct rule and violated that rule." Joint Appendix 104 ¶ 4.

As the record shows, the response by the school district was clearly an attempt to prohibit public speech in school containing any references, even if merely allusive or humorous, to human sexual activity.

Although the teachers who initially complained about the speech addressed only the obscenity issue, and the school district employee who reviewed the violation and punishment relied primarily on obscenity grounds, the attorneys for the school district properly abandoned this justification for the punishment. The petitioners conceded before the District Court, the Court of Appeals, and this Court that the speech was not constitutionally obscene for high school students.⁴² Even though *Ginsburg v. State of New York*⁴³ allows great latitude in finding a speech obscene for high school students, the petitioners apparently presumed that no court would find a speech which would be permitted on radio and television during regular hours and which contains nothing beyond the metaphors common to Shakespeare and other great literature to be obscene for high school students.

The petitioners are essentially arguing that a new exception should be established which addresses the same topic and concern as the obscenity exception but which is

42. Petition B-15 to B-22; Petition A-9 to A-10.

43. *Ginsberg v. State of New York*, 390 U.S. 629 1274.

far broader and applies only in the schools. Pet. Br. 17-21. Under this exception, the petitioners would apparently prohibit any reference to human sexual activity, by denotation or connotation, in public speech within the schools.⁴⁴

Petitioners claim that such an exception is supported by analogy to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which allowed the FCC to prohibit the use of patently offensive words during regular hours on radio broadcasts. But *Pacifica* did not suggest a broad prohibition on sexual metaphors or on speech allusively referring to human sexual activity. It is one thing to ban particular offensive words, and quite another to broadly prohibit, as Bethel implicitly claims to have done, all sexual metaphor. Nothing in *Pacifica* or current First Amendment doctrine permits the punishment of students for using in student assemblies metaphors, not indecent words at all, no different than those they are asked to read in English or Drama classes, or permits schools to monopolize the allusive and harmless reference to a field of human conduct as important to young adults as human sexuality.

Indeed, there are holdings and dicta in numerous cases to the effect that student speech at school on the topic of human sexual activity is protected by the First

44. The petitioners have found no published decisions of any court of the United States that, absent obscenity, would allow prohibition of this kind of speech.

Amendment,⁴⁵ provided, of course, it is not obscene, is not disruptive, and does not create an undisPELLable impression it is authorized or approved by school authorities. If the Court establishes a new exception to the First Amendment for the kind of speech presented in this case, the statement of the law contained in all of these cases will be effectively overruled.

-
45. *Papish v. Board of Curators, Univ. of Missouri*, 410 U.S. 667 (1973) (campus newspaper containing vulgarities and offensive cartoon, but not obscene, held protected expression); *Kois v. Wisconsin*, 408 U.S. 229 (1972) (underground newspaper containing indecent, but not obscene, photo and poem, held protected); *Jacobs v. Board of School Commissioners of City of Indianapolis*, 490 F.2d 601 (7th Cir. 1973), dismissed as moot, 420 U.S. 128 (1975) (vulgar, but not obscene, expression in unofficial student newspaper held protected); *Scoville v. Board of Education of Joliet Township*, 425 F.2d 10 (7th Cir. 1970) (inappropriate indecent, but not obscene, language in underground newspaper held protected); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973) (vulgar, but not obscene, language in campus magazine held protected); *Sullivan v. Houston Independent High School District*, 333 F.Supp. 1149 (S.D. Tex. 1971) (vulgar, but not obscene, language in student newspaper held protected); *Vail v. Board of Education of Portsmouth School District*, 354 F.Supp. 592 (D.N.H. 1973) (profane, vulgar, but not obscene, language in publication distributed on school grounds held protected); *Frasca v. Anders*, 463 F.Supp. 1043 (E.D.N.Y. 1979) (vulgar, but not obscene, language in letters published in school newspaper, held protected); *Koppel v. Levine*, 347 F.Supp. 456 (E.D.N.Y. 1972) (indecent, but not obscene language in newspaper held protected); *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2nd Cir. 1979) (offensive, indecent, but not obscene, language in off-campus student newspaper held protected); *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (1977), affirmed per curiam 564 F.2d 157 (1977) (article about sexual activity and contraception in official school newspaper considered objectionable by school officials held protected expression).

B. The Court should not establish a new exception to the First Amendment in this case.

Recognizing that established doctrine does not permit the punishment of Fraser's use of sexual metaphors in the context of a student political assembly, both the petitioners and their amici request the Court to establish a new exception to permit the punishment inflicted here. The petitioners seek an exception broadly covering "indecent student speech". Pet. Br. 17-27. The United States, even more broadly, would allow prohibition of any speech "if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint." U.S. Br. 20.

In our view, the petitioners and their amici seek an advisory opinion from the Court far more broadly formulated than the facts of this case warrant. The question presented here is not whether schools may go beyond *Tinker* to instill standards of civility and decency for students, whether the school may require the use of certain forms of address in the classroom,⁴⁶ or whether it may

46. The United States argues that schools must be allowed to insist "teachers be addressed as Mr. or Mrs. and that some suitable form of address be used toward students themselves during class discussion". U.S. Br. 19. Fraser does not contest this view because the purpose of the classroom setting requires some restrictions upon freedom of speech.

ban the use of racial epithets or religious slurs at school.⁴⁷ Instead, the issue before the Court is relatively narrow: does the First Amendment permit schools to punish, without clear standards, a high school student for presenting a speech, upon invitation, at a student political assembly, containing no indecent language whatsoever, merely because it contains sexual metaphor of a sort indistinguishable from that used throughout high school curricula in every state in the nation.

1. The First Amendment must apply in the schools to ensure the protection of free speech values.

Students have rights of freedom of speech in the schools, recognized in *Tinker*, not by mistake but for a

47. The United States repeatedly parades the bogey of racial slurs in an attempt to highlight the need for school regulation of student speech. Of course, racial slurs are the quintessential example of speech which would be regulable under *Tinker*, under a proper showing that the school's learning environment would be materially disrupted by its utterance. Compare *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (First Amendment does not permit prohibition of wearing of "freedom buttons" where school did not show impairment of school activities) with *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) (suppression of "freedom buttons" justified on showing of unusual degree of commotion, boisterous conduct, collision with rights of others, and undermining of authority.) The striking and justly celebrated pairing of *Burnside* and *Blackwell* carefully applying the correct First Amendment analysis to similar conduct but reaching different results based on the facts of each case, was heavily relied on by this Court in *Tinker*, 393 U.S. at 509, 513. In appropriate situations, racial epithets and religious slurs may also be prohibitable as "fighting words", *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1943), or expression inciting imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

reason. The principles of freedom of speech are important foundations of our society and system of government. If the principles of freedom of speech are not taught in our high schools, many citizens in our society will never learn them. Students can hardly learn the principles of freedom of speech unless they are allowed to practice them and see how they work. The State of Washington recognizes the importance of freedom of speech in the schools by giving students full rights to freedom of speech under state law.⁴⁸

A key principle of freedom of speech is that the appropriate remedy against speech containing ideas or language that others find abhorrent or distasteful is more speech. The content of the original speech will then receive the acceptance it deserves in the marketplace of ideas.

48. The Washington Administrative Code, section 180-40-215 (1983), provides:

In addition to other rights established by law, each student served by or in behalf of a common school district shall possess the following substantive rights, and no school district shall limit these rights except for good and sufficient cause:

. . . .

All students possess the constitutional right to freedom of speech and press and the constitutional right to peaceably assemble and to petition the government and its representatives for a redress of grievances, subject to reasonable limitations upon time, place, and manner of exercising such right.

. . . .

The foregoing enumeration of rights shall not be construed to deny or disparage other rights set forth in the constitution and the laws of the state of Washington or the rights retained by the people.

Of course, the very purpose of school requires restraints upon student freedom of speech in the classroom and certain school sponsored activities. But, to transmit the values of our democratic society, rights of free speech in other school contexts, especially student politics and independent student press, the core of free speech, must function like a model of the larger society. Although certain student speech might be prohibited and punished in the context of classrooms and other school activities, student speech in the context of a voluntary political assembly must be granted full protection.

This does not mean that school officials should not respond to abhorrent or distasteful speech in the contexts where freedom of speech must apply.⁴⁹ To the contrary, to teach students the values of our society, school officials have a duty to criticize and condemn the use of such speech. But, absent actual or likely disruption of the educational process, student speech in these contexts must be met in

49. In their Brief at page 27, the petitioners assert that "unfettered student expressive activity of an indecent or offensive character thwarts the educational goals of teaching students socially responsible standards of behavior and respect for others' sensibilities." Fraser is not suggesting that all student expressive activity in voluntary non-curricular settings should be unfettered. In this case, such expressive activity may be fettered by the challenge of defending the students' ideas and views on propriety to the teachers and other students. It may be fettered by social or academic disapproval. But it must not be fettered by official punishment

the marketplace of ideas rather than with the heavy hand of punishment by government agencies.⁵⁰

The requirement that government respond by more speech, rather than by proscription, can hardly have more urgent application anywhere than in school, especially as regards the irreverent and innocuous kinds of metaphors at issue here. Whether in or out of school, all high school students are inevitably and constantly exposed to the values and ideas on propriety represented by sexually suggestive speech. Students cannot be isolated from these influences. Well-known statistics demonstrate, for good or bad, that sexuality (indeed, widespread pregnancy) is hardly a forbidden territory to high school students, not just in speech, but in practice. If the school authorities wish to accept the challenge of teaching the values of our society, they must present their opposing views to the students. They cannot force students to pretend that mere sexual allusion is *terra incognita*. School authorities cannot hope to persuade the students of their views by simply punishing students who disagree with them.

-
50. A response by school officials with more speech directed to the speaker, to the audience, or both, will achieve two educational objectives. First, it will teach all the students about principles of freedom of speech, a basic societal value. Second, attempts to persuade the students that certain speech is inappropriate within our society are likely to be more effective in shaping the views of those students than punishment.

And, as a practical matter, school officials can more than adequately control the problem of the use of sexual metaphor in student speech through techniques of persuasion without using suspension.

- 2. Even if a new exception were appropriate for some settings, it should not extend to presentation of political speeches by students.**

The strenuous suggestion by petitioners and their amici that the student assembly was an aspect of the school's curriculum indistinguishable from classroom activities is inconsistent with this Court's analysis in *Board of Education v. Pico*.⁵¹ In *Pico* the Court carefully distinguished the case before it, involving the removal of a library book, from cases of either book purchase, curricular choice in the classroom, or teacher or student speech. It is relevant here that Fraser was punished not for a disrespectful vulgar remark in a classroom but for electioneering speech in a voluntary student assembly.

The basic notion that what is appropriate speech during class is not the proper measure for all school activities has recently been relied on by Congress. Exercising its power to enforce the First Amendment under Section 5 of the Fourteenth Amendment, Congress recognized in the Equal Access Act⁵² that speech which school officials could prohibit (and, in some cases, must prohibit) in classrooms may well be protected by the First Amendment in other school settings.

If distinctions can be drawn between various voluntary, non-curricular student activities to determine which are most entitled to full freedom of speech protection, certainly political assemblies should receive the greatest

51. *Board of Education v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

52. Equal Access Act, Pub.L. 98-377, Title VIII, 98 Stat. 1302.

protection.⁵³ Protection of freedom of speech within the political arena is a core First Amendment value.

The most essential ingredient in any democratic process is the presentation of uncensored speech. The appropriateness of such political speech is to be judged by the voters, who, in this case, elected Fraser's candidate and then elected Fraser to speak at graduation. To say that the school administration, the popularly perceived common adversary of the students, can ban from student political speech use of rhetorical devices that would be permissible in speech off campus to the same group, would give the students an erroneous understanding of the First Amendment and deny the students even the illusion that they have a significant political voice before the administration.

-
53. The petitioners argue, at 12-13, that the Court of Appeals misapplied "forum analysis" from *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense and Education Fund*, — U.S. —, 105 S.Ct. 3439 (1985). To the contrary, as the United States apparently agrees, "forum analysis" was not relevant to the Court of Appeals decision. In our view, the Court's "forum analysis" focuses on whether a speaker will be afforded access to a particular forum, not whether he may be prohibited from using certain forms of speech once admitted as a speaker. For example, it was irrelevant that, in *Tinker*, the classrooms were certainly not public fora for the entire school day.

However, if forum analysis is applied to this case, this political nominating assembly was clearly an open forum by designation, limited to use by students. This forum was not primarily intended for a government purpose other than as a medium of communication by, to and for students. As "a content-based prohibition"—as the United States concedes it is, U.S. Br. 20—the school rule in question "must be narrowly drawn to effectuate a compelling state interest." *Perry, supra*. As shown elsewhere in this brief, the rule in question is neither narrowly drawn nor in furtherance of a compelling state interest.

*Widmar v. Vincent*⁵⁴ holds that if college students are allowed to voluntarily assemble on campus, they must be allowed to discuss any topic they choose, including religion. In order to make this right meaningful, the students must be free to use any language or rhetorical devices, short of obscenity, that they choose. And, as the United States argued in *Bender v. Williamsport Area School District*, senior high school students should have the same freedom as college students to discuss any topic they chose.⁵⁵

3. The sexual metaphors at issue here pose no real threat of harm to senior high school students.

The United States contends that, in considering whether a speech is protected by the First Amendment or falls within the disruption exception, courts and school officials must consider whether the speech "disrupts school officials' efforts to inculcate basic standards of civility and decency". U.S. Br. 16. Later in the same paragraph, the government claims that "indecent speech disrupts the work of the school." In effect, the government is contending that the ideas and values represented by sexually suggestive speech, in themselves, are harmful to the education of the students.

Similarly, at page 27 of its brief, The National School Boards Association states a principal concern of the petitioners and their amici, that the values and ideas contained in certain speech permissible for adults may be harmful to the welfare of children. These concerns are

54. *Widmar v. Vincent*, 454 U.S. 263 (1981).

55. U.S. Br. 22-23.

tempered by three considerations. First, because the test for obscenity for children is different than the test for obscenity for adults, the speech would be properly characterized as obscene if there were a significant potential that the ideas or values represented by the speech could be harmful to children. But as previously noted, applying the variable test for obscenity as to high school students, the District Court found the speech was not obscene. Petition B-8. This finding has not been, and cannot be, questioned.

Second, the audience did not contain young children. This was a group of senior high school students where many of the seniors were already of voting age, eligible to participate in our democratic process and required to register for the draft.

Third, whether or not some speech, such as the speech given by George Carlin in *Pacifica*, might be said to be harmful (and without substantial value as well), the same can hardly be said about sexual metaphors generally, or more specifically the irreverent, humorous, innocuous kind of metaphor used here.⁵⁶ Certainly, the United States would not suggest barring Shakespeare, Melville, or similar authors who use sexual metaphors from high school curricula. Human sexuality is not an unfamiliar topic for senior high school students. Awareness of, interest in,

56. Although the petitioners presented the testimony of a so called "expert", an employee of another school district, who opined that the speech was harmful and demeaning to female students as well as male students, JA 77-82, this testimony was not credible and was given no credit by the District Court, JA 81-82. There is no evidence in the record that any students found the speech objectionable.

and reference to sexual topics is inescapably part of being a teenager.

4. Prohibition of this "indecent" speech is not viewpoint neutral.

As conceded by the amicus United States, the prohibition in this case is based on content and is not "viewpoint neutral." U.S. Br. 20-21. The record indicates that many of the students believed Fraser's use of sexual metaphor in his speech was appropriate. This view was one of the messages in Fraser's speech. Another message in his speech, which the sexual allusion communicated particularly well, was: "I am willing to stand up against the administration by saying something that you will find witty and amusing, but the administration will find objectionable. My candidate will be equally courageous in dealing with the administration." A third message in the speech was that Fraser's candidate has strengths that are associated with youthful vigor and virility. JA 46, 55. Application of the disruptive conduct rule to Fraser's speech discriminated against presentation of these three views.

In addition, Fraser believed, and alleged in his complaint, that school officials chose to punish him to silence his criticism of the administration and, by example, dissuade other students from voicing such criticism.⁵⁷

57. Approximately one year earlier, another student published an essay in a school literary magazine which, through sexual double meanings, described in detail the sexual conquest of a female by a male, including sexual intercourse. A copy of the essay is reproduced in the Joint Appendix

5. The proposed exception would not have sufficiently clear standards.

Exceptions to the guarantee of freedom of speech must be defined by clear and narrow standards so that protected

(Continued from previous page)

at 13-14. This student was not punished and was a speaker at graduation. Complaint and Answer ¶ 22, JA 7, 22.

Also one year earlier, in the same annual nominating assembly for student government, another student gave a nomination speech containing a sexual reference and four letter words. School officials summoned him to the office to discuss the matter, but he was not suspended or otherwise punished. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

Following Fraser's suspension, some students put up posters and placards in support of Fraser that contained sexual references. The students were not subjected to disciplinary action. Complaint and Answer ¶ 27, JA 8, 23.

Based in part on this evidence, Fraser contended that he was singled out for enforcement of the disruptive conduct rule, while the other students were not punished, because he was an outspoken critic of the school administration through editorials in the student newspaper and personal confrontations with gatherings of other students. JA 51; Transcript 54; Complaint ¶ 37, JA 10-11. Fraser believed that school officials wanted to silence him and dissuade other students from following his example. He believed this occasion was selected because it was the closest he came to violating school rules and it was the last chance before his graduation.

Before the District Court, Fraser claimed that, like the students in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), he was singled out for punishment to suppress expression of his views. Fraser argued that, although selective enforcement of regulations by officials is generally permissible, selective enforcement to suppress particular expression infringes rights of freedom of speech. *Tinker* at 511. This issue was not decided by either court below. Accordingly, if the Court disagrees with the judgment below, remand is required to address this unresolved claim.

speech will not be chilled by fear of transgression and so that public officials will not be allowed to restrict freedom of speech in an arbitrary or discriminatory fashion.⁵⁸ The standard for a new exception proposed to the Court of Appeals, "indecenty", was rejected as too "amorphous". Petition A-30. The standard offered by the dissent, "indecent and vulgar", Petition A-60, is no better.

Neither the petitioners nor their amici have advanced an adequately clear and narrow standard for their proposed exception to the First Amendment. The petitioners, in fact, suggest no standard whatsoever. Pet. Br. 28. The United States argues that regulation of student speech in high schools should be permitted if officials have "a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint." U.S. Br. 20. This standard is far too vague and too broad.

What is "an atmosphere of civility"? As judged by whose values? Why is civility threatened by Fraser's speech but not by Shakespeare's "The bawdy hand of the dial is now upon the prick of noon", *Romeo and Juliet*, II, iv, 119? How can school officials or judges know what are basic societal values"? If a value is held by a bare majority, is it basic, or is a super-majority required?

What amounts to suppression of a political viewpoint? As discussed above, Fraser used this rhetorical device to

58. *Miller v. California*, 413 U.S. 15, 23-24 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Chaplinski v. New Hampshire*, 315 U.S. 503 (1969).

express a political viewpoint, concerning the willingness of his candidate to disagree with the school administration, that could not have been as effectively and efficiently communicated by any other means. Is this not the suppression of a political viewpoint?

The standard proposed by the United States is too broad because it would allow regulation of speech on any disputable topic that is related to "civility" or "basic societal values" and is not clearly political. For example, speech that represents differing views on such issues as forms of address outside of classrooms, whether men should hold doors for women, table manners, belief in God, and saluting the flag, all fall within its scope.

The proposed standard is too broad because it would apply equally in all school settings, including the settings outside the classroom and similar school functions where petitioners and their amici have conceded that students have rights to freedom of speech. Also, the proposal would allow proscription of all allusions, connotations, metaphors, and references to the very condition of men and women as sexual beings, as well as literature such as that listed in the Addendum. It does not even include a distinction between intended connotations and unintended connotations perceived only by the listener.

The standard proposed by the United States is not a standard at all. It would give school authorities broad discretion to prohibit speech without considering the effects on the rights of students.

6. For constitutional purposes, this case does not involve a captive audience.

The petitioners assert that school officials can prohibit speech with sexual connotations at student political assemblies to protect students in the audience who may have been offended by the speech. This argument is meritless.

Unless each listener has previewed the speech, every listener to an oral speech is, to some extent, "captive". At least until the listener can escape the audible range of the speaker, each listener must hear what the speaker has to say.⁵⁹ But the Court has never accorded constitutional significance to ordinary degrees of captivity.

In this case, the audience was no more captive than any audience that voluntarily attends a gathering for the presentation of speeches in a confined space. Because a political nominating speech the year before contained indistinguishably "indecent" language, Fraser's rhetorical device was not unforeseeable for this forum. Any student who preferred to avoid the colorful, popular styles of adolescent speech could have attended a study hall instead of the assembly. Under these circumstances, the interests of the audience in not being "subjected" to speech indistinguishable from that encountered in curricular works, on television, and indeed throughout the culture, can hardly justify punishment of Fraser for giving this speech.

59. See *Cohen v. California*, 403 U.S. 15 (1971).

In fact, the record contains no evidence that any students were offended.⁶⁰

7. This case does not involve the state interest in controlling the presentation of information on sexuality to children.

The petitioners assert that the presentation by schools of information on human sexuality, commonly called sex education, is a delicate topic on which there is a diverse range of parental attitudes and expectations, and that presentation of such information in an irresponsible fashion can have harmful effects on adolescents. Pet. Br. 23-24. Fraser does not dispute these generalizations. However, they are wholly irrelevant here for two reasons.

First, although the state is free to regulate carefully the manner in which its employees present information on sexual topics to students, as suggested by the Administrative Rule of the Board of Education cited by petitioners at page 24, this does not suggest that the state may regulate speech on this topic by students, who are not state employees, to other students.

Second, Fraser's speech does not concern sex education or presentation of information on human sexuality. It was no more graphic, informative, or misinformative than speech that is regularly presented on radio, on television, in magazine ads, and in innumerable materials in the school library.

60. The testimony of the employee of another school district cited by petitioners only suggests that, in her view, some of the female students *should* have been offended. Pet. Br. 22-23.

8. The need for local control over school rules does not justify the proposed exception.

The petitioners suggest, at pages 24 and 35, and the amicus National School Boards Association asserts, at 28, that the parents within the local community should set the standards for acceptable and unacceptable speech within the schools. While such local authority to set school rules may be appropriate for many subjects, a group of parents who happen to be influential or in the majority cannot be allowed to establish rules which infringe upon freedom of speech. One of the essential purposes of the Bill of Rights in the U.S. Constitution is to protect the rights of individuals against infringement by others who happen to be powerful or in the majority.

II. The Disruptive Conduct rule used to punish Fraser is overbroad as construed, violating rights of free speech, and unconstitutionally vague as applied, violating rights of due process.⁶¹

A. As applied, the disruptive conduct rule is unconstitutionally vague.

The petitioners argue that the Constitution permits them considerable flexibility in the precision required for

61. While the school's Disruptive Conduct rule is constitutionally infirm as construed and as applied, it need not necessarily be rewritten. The complaint did not seek, and the District Court did not undertake, invalidation of the rule on its face. The rule could be saved by a new construction from the School District limiting its application to speech which is actually disruptive of the educational process.

school rules.⁶² Fraser agrees that school rules need not be drafted with the same specificity as criminal statutes. However, as will be shown below, the rule in this case did not even meet the petitioners' proposed standard of "sufficient to give Fraser fair warning", Pet. Br. 32, and gives school officials insufficient guidance to allow the rule to be applied with uniformity.

Even though the standard may be quite lenient for school rules generally, the standards for rules which restrict the fundamental right of free speech must be strict.⁶³ However, the school's disruptive conduct rule does not meet even the most lenient standard because, giving the words of the rule their plain meaning, the rule clearly should not apply in this case for two reasons.

First, without any ambiguity, the rule only prohibits "[c]onduct which . . . interferes with the educational process", and Fraser's speech did not cause any such in-

62. The petitioners cite *Goss v. Lopez*, 419 U.S. 565 (1975), and *New Jersey v. T.L.O.*, 469 U.S. —, 105 S.Ct. 733 (1985), which were cases involving procedures to enforce school rules rather than alleged vagueness of a school rule.

At pages 30 and 31, the petitioners quote extensively from *Arnett v. Kennedy*, 416 U.S. 134 (1974), in support of their contention that "catch-all" clauses are sufficient to meet due process requirements. However, *Arnett* does not support the petitioners' position because the case dealt with rules for government employees rather than for students. Certainly the constitutional limitations on government discipline of its own employees, where the government is acting much like a private employer, are much more lenient than constitutional limitations on the government treatment of private citizens.

63. *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967).

interference. To avoid this problem, the petitioners interpreted the rule as saying that all "obscene, profane language" on school grounds is *per se* an interference, whether or not there was an actual interference. JA 103 ¶ 3, 104 ¶ 4; Pet. Br. 32. The rule does not give fair warning of this interpretation because the interpretation is inconsistent with the plain meaning of the title and the first clause of the rule.

Second, Fraser's speech did not include any language which can fairly be considered obscene or profane. Even if these words are given a very liberal interpretation, the term "language" refers to the denotations of the words and phrases used, not the connotations, which are subject to interpretation by the listener. The rule gives no warning at all that it applies to ideas, images, or sexual metaphors. To the contrary, it rather plainly refers to dirty words.⁶⁴

64. That the school's hearing examiner subsequently construed the rule as including "indecent, lewd" language, in reliance on the Random House Dictionary of the English language, see Pet. Br. 5, is quite irrelevant. The question is what warning the phrase "obscene, profane language" provided Fraser, and what limits it imposed on administrators so that students would not be subject to discipline in their standardless discretion. See, e.g., *Kolendar v. Lawson*, ——— (——); *Lovell v. Griffin*, 303 U.S. 444, 450-53 (1944). The Random House Dictionary's definition of "obscene" as "indecent" is quite unusual. See, e.g., Webster's Seventh New Collegiate Dictionary 582 (1966) ("REPULSIVE", "designed to incite to lust or depravity").

It requires no super-human feats of administrative foresight to bar "indecent speech" or "reference to sexual activity", if, that is what schools seek to do. A prohibition of "obscene, profane language", by contrast, announces an intention to do something far narrower.

The petitioners wish to prohibit much more than just offensive words, as in *Pacifica*,⁶⁵ but they are attempting to do so with a rule that is much narrower than the statute in *Pacifica*. In *Pacifica*, the monologue, "Filthy Words" was found not obscene or profane, but only indecent. It fell within the scope of a statute which expressly prohibited the use of "indecent" language.⁶⁶ The words "obscene" and "profane" cannot be stretched to apply in this case without seriously damaging *Pacifica*.

This is not a case, however, where the determination of the rule's vagueness as applied to particular speech need to be made in the abstract. The facts of this case demonstrate that no student could have received fair warning from this rule.

First, at the same assembly in the previous year, a student gave a speech with similar allusions and was not punished.⁶⁷

Second, Fraser actually read the speech to three teachers, in advance, seeking their counsel in the best educational tradition. Teachers are a natural source of guidance for possible rule violations. None of the teachers suggested that it would, or might, violate any school rule, even though the teachers are charged with enforcement of school rules. JA 30, 32, 50, 62, 89. The teachers themselves were unaware that the speech might violate a school rule. Although two of the teachers indicated that the speech was inappropriate, the third did not; and none provided any warning. When asked how a lay person

65. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

66. 18 U.S.C. § 1464, see 438 U.S. at 731.

67. Complaint and Answer ¶ 23, JA 7, 22; JA 49.

might be able to discern what is considered "disruptive" at Bethel High School, the vice principal said: "We don't expect them to." JA 76. Under these circumstances, it is plain that Fraser himself could have had no fair warning, and school officials received neither guidance for applying the rule nor limitations upon their discretion.

Indeed, the due process point is somewhat stronger than that. It is fundamentally unfair to punish Fraser for giving a speech which was reviewed in advance, where the teachers neither warned him not to give it nor directed him to refrain from giving it.⁶⁸

B. As construed, the disruptive conduct rule is overbroad in that it prohibits speech which is protected by the First Amendment.

As interpreted by the school district, the school's disruptive conduct rule seriously infringes two kinds of student speech that are clearly protected.⁶⁹

First, as construed, "obscene, profane language" on school grounds is prohibited, whether or not it is disrupt-

68. *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (due process violated where state convicts "a citizen for exercising a privilege which the state clearly told him was available to him"); *United States v. Pennsylvania Industrial Chemical Corporation*, 441 U.S. 665, 670-75 (1973) (same).

69. At page 33 of their brief, the petitioners suggest that a rule is not overbroad if "it is viewpoint neutral on its face and seeks only to further legitimate goals in the educational environment." The petitioners misconstrue the doctrine of overbreadth. In any case, Fraser has shown in previous parts of this brief that the school district used the broad language of the disruptive conduct rule to suppress expression of his views.

tive to the educational process or occurs within curricular or similar settings. JA 104. There is no exception to the First Amendment which would allow the school to prohibit the non-disruptive use of profanity or "indecent" language between two consenting students in the school yard.

Second, the school district has ruled that obscene means "offensive to modesty or decency; indecent, lewd." JA 103. But speech which falls in these categories without being legally obscene or disruptive is protected by the First Amendment for use in most school contexts. Many statements between students might be considered "offensive to modesty", including such statements as, "I would like to see you in a bikini."

As construed, the rule sweeps far beyond dirty words to authorized punishment for sexual metaphores generally, or allusive reference to any sexual subject. Any rule which applies to cover the kinds of references and metaphors which recur throughout literature (see Addendum), on television, and generally in the life of teenagers and adults is far too expansive.

III. Petitioners' additional claims are either moot or inappropriate for resolution here.

Petitioners argue that the District Court erred in holding that the removal of Fraser's name as a candidate for graduation speaker violated his constitutional rights. As the Court of Appeals held, however, in vacating the District Court's judgment, Fraser's claim on that issue was moot. By the time of the appeal, Fraser had already won the election of graduation speakers as a write-in can-

didate and had given the speech with the District Court's order. There was no relief petitioners could have sought or been denied on appeal.

The issue is not saved from mootness, as petitioners claim, because the trial court awarded him damages in the amount of \$278.⁷⁰ Those damages were calculated as the cost of one teacher's salary at Bethel High School for two days of school, JA 89, to approximate the value or replacement cost of the lost education. Nothing was included for the threatened deprivation of a right to speak at graduation. Accordingly, petitioners have no stake in the outcome of this issue, and any ruling would be purely advisory.⁷¹

Petitioners also ask this court to review the District Court's ruling on an issue of state law. Pet. Br. 38-41. However, since the Court of Appeals has not yet considered this issue, the Court should decline to rule upon it.⁷²

70. Nor does the fact that the District Court awarded a judgment of costs and attorney fees, which presumably rests partially on this basis, prevent this issue from being moot on appeal. *Doe v. Marshall*, 622 F.2d 118, 119-20 (5th Cir. 1980); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980); *Bishop v. Committee on Professional Ethics*, 686 F.2d 1278, 1290 (8th Cir. 1982); *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944).

71. In any event, the district court was plainly correct. Free speech is a fundamental right and cannot be restricted as a form of punishment. *Procunier v. Martinez*, 416 U.S. 396 (1974) (First Amendment rights of prisoners may not be abridged as a form of punishment); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

72. *Labor Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64; see *Adikes v. Kress & Co.*, 298 U.S. 144, 174 n.2; see also *Ramsey v. United Mine Workers*, 401 U.S. 302, 312.

In addition, since the point involves only an issue of state law of general importance, its consideration by this Court would be inappropriate.⁷³

CONCLUSION

For the reasons stated above, Fraser respectfully urges the Court to affirm the judgment of the Court of Appeals. In the event the Court rules in favor of the petitioners on each issue that it considers, the Court must remand the case for consideration of other grounds which would support the result reached below. Neither the District Court nor the Court of Appeals ruled upon all of the constitutional grounds argued by Fraser which support the result reached by the District Court.

Respectfully submitted,

SIMBURG, KETTER, HALEY,
SHEPPARD & PURDY, P.S.

JEFFREY T. HALEY
Counsel of Record

CHARLES S. SIMS
American Civil Liberties Union

73. See generally Stern and Gressman, *Supreme Court Practice*, at 282-84 (1978) (citing cases).



ADDENDUM

Selected Examples Of Sexual
Metaphor And Puns In Literature
Commonly Taught In High School Curricula

SHAKESPEARE:

Samsom: I will be cruel with the maids, and cut off their heads.

Gregory: The heads of the maids?

Samsom: Ay, the heads of the maids, or their maiden-heads; take in what sense thou wilt.

Gregory: They must take it in sense that feel it.

Samsom: On me they shall feel while I am able to to stand; and 'tis known I am a pretty piece of flesh.

Romeo and Juliet, I. i. 22-29.

Nurse: (When asked the time) The bawdy hand of the dial is now upon the prick of noon.

Romeo and Juliet, II. iv. 119.

Peter (to Nurse): I saw no man use you at his pleasure; if I had, my weapon should quickly have been out, I warrant you! I dare draw as soon as another man

Romeo and Juliet, II. iv. 158-160.

Mercutio: Why, is not this better now than groaning for love? . . . for this drivelling love is like a great natural, that runs lolling up and down to hide his bauble in a hole . . . Thou desirest me to stop in my tale against the hair?

Benvolio: Thou wouldst else have made thy tale large.

App. 2

Mercurio: O, thou art deceived! I would have made it short, for I was come to the whole depth of my tale, and meant indeed to occupy the the argument no longer.

Romeo and Juliet, II. iv. 91-101.

Nurse (to Romeo): Stand up, stand up; stand, and you be a man,
For Juliet's sake, for her sake,
rise and stand.

Romeo and Juliet, III. iii. 89-90.

Hamlet: Lady, shall I lie in your lap?

Ophelia: No, my lord.

Hamlet: I mean, my head upon your lap.

Ophelia: Ay, my lord.

Hamlet: Do you think I meant country matters?

Ophelia: I think nothing, my lord.

Hamlet: That's a fair thought to lie between maids' legs.

Hamlet, III. ii. 119-125.

To serve bravely is to come halting off.

Henry, IV, Part II, II. iv. 49-50.

For, thou betraying me, I do betray
My nobler part to my gross body's treason;
My soul doth tell my body that he may
Triumph in love; flesh stays no farther reason;
But, rising at thy name; doth point out thee
As his triumphant prize. Proud of this pride,
He is contended thy poor drudge to be,
To stand in thy affairs, fall by thy side.
No want of conscience hold it that I call
Her 'love' for whose dear love I rise and fall.

Sonnet 151.

See generally Eric Partridge, *Shakespeare's Bawdy* (London 1948)

MELVILLE:

Had you stepped on board the Pequod at a certain juncture of this post-mortemizing of the whale . . . you would have scanned with no small curiosity a very strange, enigmatical object . . . Not the wondrous cistern in the whale's strange head; not the prodigy of his unhinged lower jaw; not the miracle of his symmetrical tail; none of those would so surprise you as half a glimpse of that unaccountable cone,—longer than a Kentuckian is tall, nigh a foot in diameter at the base, and jet-black as Yojo, the ebony idol of Queequeg. And an idol, indeed, it is . . .

Look at the Sailor, called the mincer, who now comes along, and . . . heavily hacks the *grandissimus* . . . and . . . staggers off with it as if he were a grenadier carrying a dead comrade from the field. Extending it upon the forecastle deck, he now proceeds to . . . give it a good stretching, so as almost to double its diameter . . . and then cutting two slits for armholes at the other end he lengthwise slips himself bodily into it. The mincer now stands before you in the full canonicals of his calling . . . Arrayed in decent black; occupying a conspicuous pulpit; intent on bible leaves; what a candidate for an archbishoprick . . . !

Moby Dick, Chapter 95 ("The Cassock").

15
No. 84-1667

Supreme Court, U.S.

FILED

FEB 13 1986

JOSE F. SPANIOL, JR.
CLERK

**In The
Supreme Court of the United States**
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403;
CHRISTY B. INGLE; DAVID C. RICH;
J. BRUCE ALEXANDER; AND
GERALD E. HOSMAN,
Petitioners,

vs.

MATTHEW N. FRASER, A MINOR,
AND E. L. FRASER, AS HIS
GUARDIAN AD LITEM,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF OF PETITIONERS

KANE, VANDEBERG, HARTINGER
& WALKER

First Interstate Plaza
Suite 2000
Tacoma, WA 98402-4391
Telephone: (206) 383-3791

By: WILLIAM A. COATS
Counsel of Record
and
CLIFFORD D. FOSTER, JR.
Attorneys for Petitioners

TABLE OF CONTENTS

	Pages
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
1. Viewpoint Neutral Regulation of Indecent Student Speech Is Permissible in the School Environment	1
2. Fraser's Depiction of Sexual Activity Was Not Speech on a Matter of Public Concern	3
3. The District Does Not Seek to Suppress the Topic of Sexuality	7
4. This Court's Obscenity Doctrine Is Inappli- cable	9
5. The District's Position States a Workable Constitutional Rule	11
6. "More Speech" by School Officials Fails to Redress the Constitutional Harm of Sex- ually Offensive Student Speech	13
7. The Disruptive Conduct Rule Gave Fair Warning to Fraser	17
8. Removal of Fraser's Name from the List of Graduation Speakers Is Not Moot	18
9. The District Court's Sua Sponte Decision on a State Law Issue Was a Reversible Abuse of Discretion Under Federal Law	19
CONCLUSION	20

TABLE OF AUTHORITIES

Pages

CASES:

Board of Education v. Pico, 457 U.S. 853 (1982)	1, 2, 5, 8, 12
Board of Education v. McCluskey, 458 U.S. 966 (1982) (per curiam)	17
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	18
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	1
Cohen v. California, 403 U.S. 15 (1971)	15
Connick v. Myers, 461 U.S. 138 (1983)	<i>passim</i>
Cornelius v. NAACP Legal Defense and Education Fund, Inc., 87 L.Ed.2d 567, 105 S. Ct. 3439 (1985)	2
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	<i>passim</i>
Financial General Bank Shares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982)	19
Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974)	19
Ginsberg v. New York, 390 U.S. 629 (1968)	9, 10
Miller v. California, 413 U.S. 15 (1973)	9, 10, 11
Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973)	10
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)	1, 5
Procunier v. Martinez, 416 U.S. 396 (1974)	19
Roth v. United States, 354 U.S. 476 (1957)	1
Shelton v. Tucker, 364 U.S. 479 (1960)	13
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	2, 7, 11, 12
Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam)	19

TABLE OF AUTHORITIES—Continued

	Pages
Young v. American Mini Theatres, 427 U.S. 50 (1976)	2, 5, 7, 8
Wayte v. United States, 84 L.Ed.2d 547, 105 S. Ct. 1524 (1985)	16
 OTHER AUTHORITIES:	
Diamond, <i>The First Amendment and Public Schools: The Case Against Judicial Intervention</i> , 59 Tex. L. Rev. 477 (1981)	12
Farber, <i>Content Regulation and the First Amend- ment: A Revisionist View</i> , 68 Geo. L.J. 727 (1980)	5
Farber and Nowak, <i>The Misleading Nature of Public Forum, Analysis, Context and Content First Amendment Adjudication</i> , 70 Va. L. Rev. 1219 (1984)	5
Note, <i>Content Regulation and the Dimension of Free Expression</i> , 96 Harv. L. Rev. 1854 (1983)	5
Stephan, <i>The First Amendment and Content Dis- crimination</i> , 68 Va. L. Rev. 103 (1982)	5
L. Tribe, <i>American Constitutional Law</i> (1978)	1, 15



ARGUMENT

1. Viewpoint Neutral Regulation of Indecent Student Speech Is Permissible in the School Environment.

Fraser asserts that Petitioners [the "District"] can discipline him for his assembly talk only if it falls within one of several narrowly drawn categories of speech exempt from first amendment protection. Resp. Br. at 9-11. This analysis presupposes a categorical delineation between protected "speech," immune from any content based regulation, and constitutional "nonspeech," which is subject to governmental suppression because its social value does not warrant first amendment protection. *Id.* See, e.g. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); L. Tribe, *American Constitutional Law*, 602-608, 670-672 (1978). This rigid analysis, however, fails to address the special first amendment considerations arising from indecent student speech in public schools. The District contends that this Court's precedents not only require a balancing of the compelling state interests implicated by sexually offensive student speech at school sponsored functions, but also teach that viewpoint neutral discipline in response to such speech is constitutionally permissible.

This Court has employed a balancing analysis for content based governmental responses to speech within a specific environment, forum, or medium in a series of decisions. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983) (speech of public employees in the workplace); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) ("public forum" analysis); *Board*

of *Education v. Pico*, 457 U.S. 853 (1982) (removal of school library books); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (sanctions for indecent radio broadcasts); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (special zoning requirements for adult theaters). The common analytical ground of these decisions is a balancing of free expression interests against governmental claims that the expression interferes with control over its property or is incompatible with its activities in a specific context.¹ Contrary to Fraser's assumptions, these precedents reveal that not all content based regulation of speech triggers the rigid speech/nonspeech categorization analysis he proposes. Most significantly, these decisions, and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), demonstrate that sexually offensive student speech at school sponsored activities is incompatible with the goals and responsibilities of public education and warrants viewpoint neutral discipline. Pet. Br. at 12-29.

1. Fraser and the National Education Association argue that cases such as *Perry Education Association and Cornelius v. NAACP Legal Defense and Education Fund*, 87 L.Ed.2d 567, 105 S. Ct. 3439 (1985), are irrelevant because their reasoning is limited to the problem of a speaker's access to a particular forum. Resp. Br. at 27, NEA Br. at 7-8. The focus of "forum" analysis, however, is the compatibility of the asserted free expression rights with the government's interest in preserving the "forum" for its own purposes. Pet. Br. at 12-17. In this light, a factual distinction between access and discipline of a student speaker is irrelevant. This argument, moreover, assumes that the student assembly was a limited public forum, or forum by designation, without analyzing the District's interests in controlling this educational activity. Thus, it begs the question of whether Fraser's speech was incompatible with the District's educational mission. Accordingly, "public forum" cases are relevant because they, like *Myers*, *Pico*, and *American Mini Theatres*, help identify the competing interests that must be weighed in reviewing viewpoint neutral, but content sensitive, restrictions on expression limited to a certain environment.

2. Fraser's Depiction of Sexual Activity Was Not Speech on a Matter of Public Concern.

Fraser uncritically assumes his speech was entitled to full first amendment protection. In *Connick v. Myers*, however, this Court held that discipline of public employees based on expressive activity in the workplace does not trigger first amendment scrutiny when the "expression cannot be fairly considered as relating to any matter of political, social or other concern to the community. . . ." 461 U.S. at 146.² Absent such a showing, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 157. To determine whether speech involves a matter of public concern, the issue "must be determined by the content, form and context of a given statement as revealed by the whole record. . . ." *Id.* at 147-148. Significantly, *Myers* recognizes that although discipline for public employee speech on matters of personal concern does not invoke judicial review, such speech is nonetheless entitled to first amendment protection outside of the limited environment of governmental employment. *Id.* at 146-147.

Myers is applicable to student disciplinary actions. Public school administrators, like public employers, require discretion to manage the educational program to

2. Although the dissent would have characterized *Myers'* speech as involving matters of public concern, it did recognize that in the balancing of a public employer's interests against an employee's first amendment rights, the content of the employee's expression is a relevant consideration. 461 U.S. at 157 n.1 (Brennan, J., dissenting).

achieve its desired ends. Indeed, the dissent in *Myers* expressly observed that public schools and public employment are similar contexts for the purpose of determining the extent of first amendment rights. *Id.* at 168-169 (Brennan, J., dissenting). Furthermore, unlike public employers, public schools have an educational responsibility to teach students community standards of decency and civility. Pet. Br. at 17-21. Although public employers generally have no legitimate interest in regulating employee discourse absent interference with productivity, public schools have an interest in regulating student speech extending beyond prevention of disruption to the independent educational goal of teaching students social and moral standards for the form of public discourse. Given these considerations, discipline of either public employees or public school students for speech not involving matters of public concern does not trigger judicial scrutiny under the first amendment.

The record reveals the District disciplined Fraser not for any expression of views on matters of public concern, but for his offensive depiction of sexual activity. Although Fraser attempts to characterize the discipline as retaliation for implied criticism of the school administration in his talk, his testimony reveals the sexual innuendo neither served a political purpose nor was indispensable to his purported "message." Resp. Br. at 30-33.³ Instead, it was an attempt at "humor":

3. Fraser boldly asserts his "message" could not have been communicated as effectively by any other means; thus, the discipline was viewpoint suppression. Resp. Br. at 33. This approach, however, collapses the distinction between government suppression of viewpoint, which violates its fundamental

(Continued on following page)

Q . . . What was the purpose of the speech?

A The purpose of the speech when I wrote it was to amuse the audience and hopefully to establish a rapport with the audience so that I could get my candidate elected.

. . .

Q You deliberately used sexual innuendos in this speech, did you not?

A Yes.

Q You anticipated that when you gave this speech that the audience would perceive the sexual innuendos, did you not?

A I expected that some people would pick it up, yeah.

JA at 45-46. The District's hearing officer, moreover, expressly found the discipline was motivated solely by Fraser's intentional use of sexual innuendo and connotations, not by any implied criticism of the school admini-

(Continued from previous page)

obligation of neutrality, and content sensitive, but viewpoint neutral, regulation of speech based upon special first amendment considerations inherent in a limited environment. See, e.g., *Myers, Perry Education Association, Pico, Pacifica, and American Mini Theatres*. See generally, Farber and Nowak, *The Misleading Nature of Public Forum, Analysis, Context and Content First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984); Farber, *Content Regulation and the First Amendment: A Revisionists' View*, 68 Geo. L.J. 727 (1980); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 103 (1982); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854 (1983). Clearly, if Fraser had expressed his purported critique of school administration without sexual references, the speech in itself would provide no basis for disciplinary action.

stration. JA at 101-103. Indeed, Fraser's prior criticisms of school officials, lacking sexual innuendo, did not provoke disciplinary action, even when he confronted a school administrator before a group of students and accused him of wrongdoing. JA at 51; Tr. of Proc. (CR 15) at 54.⁴

Under *Myers*, then, the proper inquiry is whether a juvenile rape fantasy expressed to a captive audience of students at a school-sponsored assembly involved a matter of public concern. Surely, Fraser's description of a "man firm in his pants," who "takes his point and pounds it in," who "doesn't attack things in spurts," and who "goes to the very end—even the climax," is not expression that can be "fairly considered as relating to any matter of political, social or other concerns of the community. . . ." 461 U.S. at 719. The District's discipline of Fraser, there-

4. Fraser makes several factual assertions that either are unfounded or were disputed at trial concerning the District's alleged motive for disciplining him. Resp. Br. at 1, 4, 30-31. First, the district court made no findings that criticism of school administrators played a role in the disciplinary action. PC App. at B-1 to B-7. Indeed, Judge Tanner denied Fraser's post-trial motion to amend the Findings of Fact and Conclusions of Law to incorporate his theory that he was singled out for discipline because of such criticism. Clerk's Docket #9-10, JA 1-2. Second, the District's Answer denied Fraser's allegations that administrators were "hostile" to him because of his written and oral comments on school administration. Complaint ¶ 16-17, JA 6; Answer ¶ 16-17, JA 21-22. Petitioner Rich, the school principal, testified that he admired Fraser for his past speeches concerning school administration, including the challenging way in which they were written, but they played no role in the decision to discipline him for the assembly talk. JA 84-85. Fraser also testified the administrators who actually disciplined him had never retaliated against him for his criticism of the administration. JA at 56-57.

fore, did not implicate first amendment interests sufficient to warrant judicial review.⁵

3. The District Does Not Seek to Suppress the Topic of Sexuality.

Fraser contends the District seeks to suppress the topic of sexuality and that it was powerless to discipline his speech because "sexual metaphors or puns" are common rhetorical devices in political speech and literature. Resp. Br. at 6-7, 11-14. This argument ignores both the context of his talk, and the District's educational interest in regulating the deliberate use of sexually offensive expression.

Indecent forms of expression may be subject to regulation in certain limited environments, even though entitled to first amendment protection in other contexts. *FCC v. Pacifica Foundation*, 438 U.S. at 744-51; *Young v. American Mini Theatres*, 426 U.S. at 63-73.⁶ Similarly, in

5. *Tinker*, moreover, is consistent with *Myers*. In contrast to Fraser's gratuitous use of sexual innuendo, *Tinker* involved discipline of students for a nonoffensive and nondisruptive symbolic expression of their viewpoint on the Viet Nam conflict—a subject of undeniable public concern. Pet. Br. at 12-14. In short, *Tinker's* protection against suppression of student speech based on viewpoint, and its "material disruption" dicta, presuppose that the views students express involve a matter of public concern.

6. Contrary to Fraser's assertions, the rationale for allowing school authorities to regulate offensive or indecent forms of student expression is even stronger than in the contexts considered in *Pacifica* or *American Mini Theatres*. See Resp. Br. at 19, 39; NEA Br. at 4-5. *Pacifica* is not based upon the special sanctity of the radio listener's home; the dispute arose

Board of Education v. Pico, the plurality acknowledged that public school officials retain discretion to remove library books on grounds of educational suitability, including vulgarity and bad taste. 457 U.S. at 871-72. Fraser's debasing depiction of sexual activity, which included vocal emphasis on sexual connotations to insure his meaning was clear, pervaded his entire speech. The speech was not only educationally unsuitable because it was "pervasively vulgar" and in "bad taste," but also indecent and offensive under the ordinary definition of "obscene" as construed by the District in its disruptive conduct rule. Pet. Br. at 32.

Fraser's attempt to equate discipline of his "I know a man who is firm" speech with censorship of Melville or Shakespeare further ignores the necessity of analyzing the speech within its particular context. To be sure, sexual innuendo, puns, and themes appear in classroom texts and library books used within the District. But such materials are either presented in a responsible, nonoffensive manner by professional educators in courses tailored to the age and maturity of students or are matters of voluntary student inquiry.

(Continued from previous page)

when a father heard the "Filthy Words" monologue on his car radio while driving with his son and then complained to the FCC. 438 U.S. at 729-30. Furthermore, students at the assembly, unlike a radio listener, do not have the option of changing the station. Finally, the deleterious effects on the learning process, sexual role modeling, and the District's interest in teaching students to refrain from offensive ways of communicating their ideas are more particularized governmental interests than the City of Detroit's fear in *American Mini Theatres* that adult entertainment establishments would pose a threat to quality of life in certain neighborhoods. 427 U.S. at 53-56.

Most importantly, the District claims no authority to suppress completely the topic or "idea" of sexuality within the school environment.⁷ It does seek authority to insure that sexuality is discussed responsibly and maturely at school sponsored activities, and to prohibit students from deliberately using sexually offensive innuendo before a captive audience. In this context, then, viewpoint neutral regulation of student speech based solely upon its intentionally offensive or indecent manner neither involves government censorship of ideas nor threatens suppression of classic works of literature.

4. This Court's Obscenity Doctrine Is Inapplicable.

Fraser argues that absent physical disorder, student speech must be legally "obscene" under *Miller v. California*, 413 U.S. 15 (1973) and *Ginsberg v. New York*, 390 U.S. 629 (1968), before a school may respond with disciplinary action. Resp. Br. at 10-11, 28-29. This Court's "obscenity" doctrine, however, is incapable of addressing the competing interests arising from sexually offensive student speech in the school environment.

7. Indeed, the District's own construction of its disruptive conduct rule does not support Fraser's assertion that it is seeking to suppress the topic of sexuality. As construed, the rule prohibits only offensive and indecent speech, not the topic of sexuality. For example, if a student speaker nominated a candidate "because he or she would lobby the school administration to establish a family planning clinic within the school," such a speech, despite the controversy it might provoke among staff, students or parents, would not contain offensive or indecent language. Clearly, the District's rule is directed only toward the presentation of ideas in an offensive manner, not toward ideas or subjects that certain persons would find "offensive."

To review complete state suppression and criminal punishment of "obscene" speech, *Miller* articulated standards for determining whether the regulated expressive activity is entitled to any first amendment protection. *Ginsberg* acknowledged that a state has greater latitude with minors than with adults when regulating distribution of sexually oriented materials.⁸ Neither *Miller* nor *Ginsberg*, however, purport to address situational restraints on otherwise protected indecent speech that are limited both spatially and temporally to the school environment.

To define constitutionally "obscene" speech is extraordinarily difficult at best, and in the opinion of several Justices, an impossibility. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73-114 (1973) (Brennan, J., dissenting). Requiring public schools to adopt rules specifically defining "obscenity" would not only impose an unworkable standard, (Pet. Br. at 34-35), but also ignore the compelling state educational interests that make public schools a "special environment" for first amendment purposes. The analytical and practical problems of sexually offensive student speech are simply not addressed by this Court's obscenity doctrine.

Finally, obscenity decisions are inapposite because they involve regulation of adult expression, not the speech of school children. The state typically has no legitimate concern with the content of offensive, but nonobscene,

8. *Ginsberg* is not a true "obscenity" case. Instead, the issue turned on whether a statute that only prohibited distribution of certain materials to minors, but did not preclude adults from obtaining such materials, infringed upon an "area of freedom of expression constitutionally secure to minors." 390 U.S. at 637.

adult communication absent such factors as the presence of children or a captive audience. Educators have an interest both in protecting children compelled to attend school sponsored activities from unexpected exposure to indecent speech and in teaching the student speaker to refrain from such expression. Pet. Br. at 26-27. School children lack the experience to make fully mature decisions concerning their expressive faculties, and this immaturity warrants restrictions upon their first amendment rights. Pet. Br. at 26-27, U.S. Br. at 16-18. Because of the ongoing educational interest in the speaker's education, and because the first amendment rights of children are not coextensive with those of adults, *Miller* and its progeny are inapplicable.

5. The District's Position States a Workable Constitutional Rule.

Fraser argues the District proposes an unworkable constitutional rule. Resp. Br. at 31-33. This argument misstates the District's position. Indecent student expression at school sponsored activities is strictly incompatible with compelling state educational interests. Pet. Br. at 17-29. Because viewpoint neutral discipline of students for such speech does not implicate the core first amendment value of protecting the exchange of ideas, the following standard of review is warranted:

First, to establish a first amendment claim, Fraser had the initial evidentiary burden of proving that the decisive factor for the District's discipline was an intent to suppress or otherwise discriminate against his expression of a viewpoint on a matter of public concern.⁹ Pet. Br. at

9. This standard was clearly envisioned by Justice Harlan's dissent in *Tinker*. After acknowledging the application of

17-21, 27-29. Absent such proof, no first amendment interests sufficient to warrant judicial scrutiny were implicated.

Second, assuming *arguendo* that Fraser could demonstrate viewpoint suppression on a matter of public concern was the decisive factor motivating the discipline, then under *Tinker*, the District demonstrated the speech caused a substantial disruption to the educational process and that further disruption could be reasonably forecast. Disruption of the educational process, moreover, is not limited to inability to maintain physical order; it also includes less tangible, yet nonetheless real, emotional and social disruptions to the learning process. Even if the

(Continued from previous page)

free expression rights in the public school environment, he observed:

To translate that proposition into a workable rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than a legitimate school concern—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

393 U.S. at 526. (Harlan, J., dissenting). See *Pico*, 457 U.S. at 871-72. Although the District's standard explicitly addresses viewpoint suppression, it incorporates Justice Harlan's concern with articulating a clear threshold standard for student first amendment claims. Indeed, *Tinker's* failure to articulate clearly its analytical framework, especially the weight to be accorded to the characteristics that make the public schools a "special" first amendment environment, has caused confusion and uncertainty in the circuit and district courts. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 482-86 (1981). The District's position does not require any modification of *Tinker's* prohibition on viewpoint suppression, but rather seeks to restate clearly the threshold requirements of student first amendment claims, and the factors that must be evaluated in weighing them.

Court were to consider the discipline as viewpoint suppression, the record nonetheless demonstrates the District satisfied this more stringent standard.

Contrasted with this approach, Fraser's and the lower courts' analyses of indecent student speech turn any student disciplinary action based on verbal expression into a constitutional dispute. The district court placed an initial evidentiary burden on the District to prove Fraser's speech was either constitutionally obscene or physically disruptive. *Id.*; PC App. at B-2 to B-10. Indeed, it did not require Fraser to present any evidence at trial. Tr. of Proc. (CR 15) 2-26. This analytical approach, which the Ninth Circuit affirmed, reduces the federal judiciary from guardians of the fundamental guarantee of informed self government into a student conduct review board—such bathos is not the law.

6. "More Speech" by School Officials Fails to Redress the Constitutional Harm of Sexually Offensive Student Speech.

Fraser and the National Education Association argue the District was constitutionally precluded from disciplining Fraser because a less drastic response of "more speech" was available. Resp. Br. at 15-17, 22-25; NEA Br. at 5, 10-11. This approach not only usurps the discretionary authority of educators, but also exacerbates the very harm to the educational process that discipline of indecent student speech seeks to remedy.

The case authority for Fraser's "more speech" analysis is inappropriate for the school environment. Decisions such as *Shelton v. Tucker*, 364 U.S. 479 (1960), concern purportedly content neutral regulation of speech in traditional first amendment public fora that nonethe-

less impose incidental burdens on free expression rights. Because such governmental measures are not justified by reference to the content of the regulated speech, judicial scrutiny is appropriate to determine if less restrictive measures are available to effectuate the government's regulatory goals.

In the instant case, however, the deleterious impact of indecent student speech in the school environment supplies the constitutional rationale for the District's disciplinary action. In cases where a special environment, forum, or medium allows governmental responses based on content, this Court has not employed a "less drastic means" analysis. See *Connick v. Myers*, 461 U.S. at 150-52; *Pacifica*, 438 U.S. at 744-50. Accordingly, decisions concerning the incidental impact of time, place, or manner restrictions in a classic first amendment forum fail to address and weigh the competing first amendment interests arising in the public school environment.

When those interests are properly weighed, it is clear that indecent student speech at school conducted activities creates a harm that is not remedied by further expressive activity. Fraser's depiction of sexual activity was invasive of privacy interests, uniquely demeaning to female students, and disruptive to the learning environment. JA at 42-43, 72-81. Without prior warning or consent, his audience was forced to reveal publically their emotional reaction to a crude description of sexual activity.¹⁰ Such

10. This unconsented and unexpected invasion of the privacy rights of a captive audience of children also distinguishes the case authority Fraser cites on page 20, n. 45, of

an assault upon intimate sensibilities was a constitutionally sound reason to restrict his expression. See *Cohen v. California*, 403 U.S. 15, 20 (1971); L. Tribe, *American Constitutional Law*, 681 (1978). To respond to such speech by expressing disapproval would only prolong or renew this harm. As the plurality noted in *Pacifica*, "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748-749. Fraser's audience could neither run nor turn the dial. The possibility of "more speech" does not afford him constitutional immunity because it would not redress the harm he inflicted on privacy interests.

A judicial search for less restrictive alternatives than discipline also deprives educators of control over school activities. In the analogous context of public employment, this Court in *Connick v. Myers* observed that the "First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." 461 U.S. at 149. Fraser's "more speech" argument would allow students, not administrators or teachers, to determine the educational agenda at school sponsored

(Continued from previous page)

his brief. These cases concern distribution of written materials, such as underground newspapers, or involve the noncompulsory learning environment of university education. Because a student can refuse to read written materials, their distribution in itself does not pose a significant danger to privacy interests. Similarly, the context of distribution of written materials also poses a lesser risk that offensive expression will be perceived as authorized by school authorities. These factors warrant more intensive judicial scrutiny of measures restricting the distribution of written materials. See Pet. Br. at 31, n.5.

events. Student speakers could effectively dominate and disrupt such activities by use of offensive forms of expression if the first amendment precluded school authorities from any response except "rebutting" such speech. The federal constitution does not require school administrators to run their educational programs as debating societies for students that use sexually offensive means to express themselves.

Finally, "more speech" may be a sound educational response to offensive student speech in certain circumstances, but to say that response is the only constitutionally sound one usurps the discretion and diversity in educational policy essential to our nation's system of public education.¹¹ Fraser's and the NEA's "more speech" argument is an ill-disguised attempt to impose one educational philosophy as a federal constitutional imperative. Absent suppression of viewpoint on matters of public concern, a public school's response to indecent speech should be committed to the discretion of local educators and policymakers.¹²

11. The District exercised this discretion permissibly when it chose not to discipline students carrying signs with sexual innuendo the day following Fraser's speech or other students that allegedly engaged in similar conduct in prior years. See Resp. Br. at 30, n.57. Concerning Fraser's allegations of "selective enforcement" of the disruptive conduct rule, the record demonstrates the discipline was not motivated by his purported criticism of the school administration in the assembly speech or in prior incidents. See pp. 6-7, *supra*. Accordingly, this claim is also meritless and should be dismissed. See *Wayte v. United States*, 84 L.Ed.2d 547, 105 S. Ct. 1524 (1985).

12. The District does agree with Fraser that it must teach constitutional principles both in practice and in theory. Resp. Br. at 25. Indeed, the District hopes that its discipline of Fraser

(Continued on following page)

7. The Disruptive Conduct Rule Gave Fair Warning to Fraser.

Fraser misconstrues both the scope and construction of the District's disruptive conduct rule.

First, the plain language of the rule defines "disruptive conduct" to include the use of "obscene" language by students. As construed by the school district, "obscene" language means conduct or language "offensive to modesty or decency; indecent, lewd." JA at 103. Contrary to Fraser's assertions (Resp. Br. at 37-38), the District's construction of the rule and its application to Fraser's assembly speech was reasonable and thus controlling. *Board of Education v. McClusky*, 458 U.S. 966, 968-69 (1982) (per curiam). Pet. Br. at 32.

Second, the rule as applied gave Fraser fair notice his conduct was prohibited. Although he asserts no one told him his speech would violate a school rule, the record reveals that the teachers who previewed his speech (1) advised him it was inappropriate and not to give it (JA at 30), and (2) warned that it would "cause problems," have "negative consequences," and implied that a suspension might result. JA at 60-61. Furthermore, the very fact Fraser sought out teachers to preview his speech is indicative that he knew it might result in disciplinary action. Despite these warnings, he chose to deliver the speech.

(Continued from previous page)

will teach that the first amendment does not render school authorities impotent to deal with students that impose upon the privacy and equal education opportunity rights of others by gratuitously and deliberately expressing themselves in a sexually offensive manner at school functions.

Finally, Fraser presumes that he is entitled to assert a facial overbreadth challenge. Resp. Br. at 40-41.¹³ Clearly, his verbal assault fell squarely within the proscription of the disruptive conduct rule, and thus application of the rule to hypothetical factual situations should not be entertained. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-618 (1973); Pet. Br. at 33-35.

8. Removal of Fraser's Name from the List of Graduation Speakers Is Not Moot.

Fraser argues removal of his name as a candidate for graduation speaker is a moot issue because the judgment awarding damages does not rest upon this ground. Resp. Br. at 42. The record, however, reveals that Fraser's complaint sought damages for all of his constitutional claims. JA at 12. The district court did not allocate damages among the claims, but rather directed the parties to try to stipulate to the amount of a damage award, which they did. PC App. at B-10, C-4 to C-5. Because the record does not reveal any allocation of the damage award among Fraser's successful claims, and because the trial court specifically entered a declaratory judgment, as well as an injunction, invalidating removal of Fraser's name, (PC App. at C-1 to C-3), the money judgment rests, in part, on this issue and the parties still have a monetary stake in its outcome.

13. Fraser's argument that the District's rule is overbroad because teenagers are regularly exposed to sexual metaphor on television or at the movies (Resp. Br. at 41) scarcely warrants a constitutional rule that the decorum of school sponsored events must be reduced to the tastelessness of network programmers or producers of teenage sex comedies.

In addition, the case authority Fraser cites on the removal issue is inapposite. Resp. Br. at 42. *Procunier v. Martinez*, 416 U.S. 396 (1974), involved prison regulations allowing censorship of prisoners' mail; it does not involve denial of a student's privilege to participate in an extracurricular school activity as a form of discipline. Similarly, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), involved a statute imposing a prior restraint on habitual distributors of obscene materials; it, too, is not applicable to school disciplinary measures.

9. The District Court's Sua Sponte Decision on a State Law Issue Was a Reversible Abuse of Discretion Under Federal Law.

Fraser misconstrues the fourth question accepted for review by the court. Resp. Br. at 42-43. The actual issue is whether the district court abused its discretion by exercising pendent jurisdiction over and incorrectly deciding a state law issue concerning the Washington State Board of Education's rules on student discipline. The district court's abuse of discretion in its assumption of pendent jurisdiction, especially because that discretionary authority was exercised *sua sponte*, is grounds for reversal of the judgment under federal law. Pet. Br. at 38-41. See *Financial General Bank Shares, Inc. v. Metzger*, 680 F.2d 768, (D.C. Cir. 1982); *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974).

CONCLUSION

The District respectfully urges the Court to reverse and vacate the judgments of the Ninth Circuit Court of Appeals and the district court, and remand the case with instructions to enter an order of dismissal with prejudice or an order of remand for further proceedings consistent with appropriate constitutional law standards.

DATED: February 12, 1986.

Respectfully submitted,
KANE, VANDEBERG, HARTINGER
& WALKER
First Interstate Plaza
Suite 2000
Tacoma, WA 98402-4391
Telephone: (206) 383-3791

By: WILLIAM A. COATS
Counsel of Record
and
CLIFFORD D. FOSTER, JR.
Attorneys for Petitioners

No. 84-1667

Supreme Court U.S.

FILED

NOV 27 1985

JOSEPH R. SPANIOLO, JR.

In The
Supreme Court of the United States
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; et al.,
Petitioners,
v.

MATTHEW N. FRASER, a Minor; et al.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION;
NATIONAL SCHOOL SAFETY CENTER; AMERICAN
ASSOCIATION OF SCHOOL ADMINISTRATORS; NATIONAL
ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;
NATIONAL ALLIANCE FOR SAFE SCHOOLS; INTERNATIONAL
ASSOCIATION OF EDUCATIONAL PEACE OFFICERS;
NATIONAL ASSOCIATION OF SCHOOL SECURITY
DIRECTORS; CALIFORNIA SCHOOL PEACE OFFICERS
ASSOCIATION; CENTER FOR EDUCATIONAL LEADERSHIP;
DR. STUART GOTHOLD, SUPERINTENDENT OF
LOS ANGELES COUNTY SCHOOLS, CALIFORNIA;
HERBERT SANG, SUPERINTENDENT OF DUVAL COUNTY
SCHOOLS, FLORIDA; DR. FLORETTA MCKENZIE,
SUPERINTENDENT OF DISTRICT OF COLUMBIA SCHOOLS;
SAN DIEGO UNIFIED SCHOOL DISTRICT; AND VICTIMS
ASSISTANCE LEGAL ORGANIZATION IN SUPPORT OF
PETITIONER, BETHEL SCHOOL DISTRICT NO. 403, ET AL.

GEORGE NICHOLSON
Chief Counsel
National School Safety
Center
7311 Greenhaven Drive,
Suite 100
Sacramento, California 95831
Telephone: (916) 427-4600

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amici Curiae

TABLE OF CONTENTS

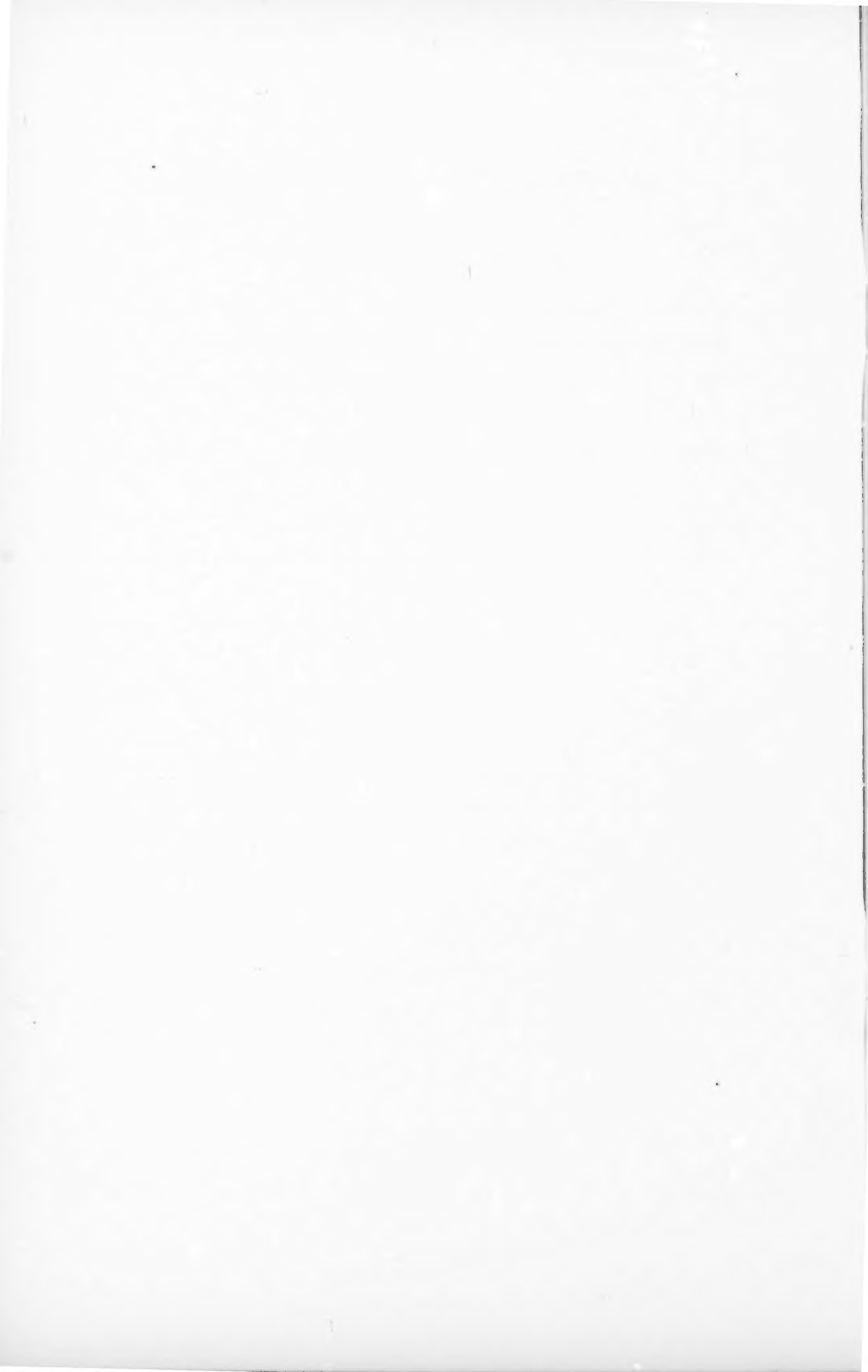
	Page
TABLE OF AUTHORITIES CITED	ii
INTERESTS OF AMICI	1
OPINION BELOW	6
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE NEEDS OF THE EDUCATION PROCESS LIMIT A STUDENTS' RIGHT OF FREE SPEECH	10
A. Students' Free Speech Rights May Be Reasonably Limited to Meet the Needs of the School Environment	10
B. School Authorities May Place Reasonable Time, Place, and Manner Restrictions on Speech to Protect the School Environment from Disruption	12
C. Indecent Speech in the School Environment Undermines School Officials' Efforts to Maintain Minimum Standards of Behavior and to Protect Unsuspecting and Unwilling Listeners	13
II. COURTS SHOULD NOT INTERFERE IN DAILY SCHOOL OPERATIONS ABSENT AN ABUSE OF BASIC CONSTITUTIONAL RIGHTS	15
III. A REASONABLENESS STANDARD MUST APPLY TO SCHOOL CONDUCT RULES	16
A. School Disciplinary Rules Must Be Sufficiently Flexible to Maintain Orderly Conduct.....	16
B. A Standard of Reasonableness Is Required to Give School Officials the Necessary Flexibility to Maintain Order in the School Environment	19
CONCLUSION	21

TABLE OF AUTHORITIES CITED

	Page
CASES	
<i>Blackwell v. Issaquena County Board of Education</i> , 363 F.2d 749 (5th Cir. 1966)	15
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982) 8, 10, 11, 12	
<i>Burnside v. Byars</i> , 363 F.2d 744 (5th Cir. 1966)	17
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1926)	17
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	8, 15
<i>Esteban v. Central Missouri State College</i> , 415 F.2d 1077 (8th Cir. 1960)	18
<i>Federal Communications Commission v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	13, 14
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	15
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	18
<i>Murray v. West Baton Rouge Parish School Board</i> , 472 F.2d 438 (5th Cir. 1973)	17, 18
<i>New Jersey v. T.L.O.</i> , — U.S. —, 105 S. Ct. 733 (1985)	19, 20
<i>Perry Education Association v. Perry Local Edu- cators' Association</i> , 460 U.S. 37 (1983)	12, 13
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	18
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1968) 8, 9, 10, 11, 14, 16, 18, 21, 22	
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	16

TABLE OF AUTHORITIES CITED—Continued

	Page
UNITED STATES CONSTITUTION	
First Amendment	7, 10, 11, 14, 16, 18
Fourth Amendment	19
RULES	
Supreme Court Rule No. 36	1
MISCELLANEOUS	
<i>Webster's Third New International Dictionary</i> 1557 (1971)	21



In The
Supreme Court of the United States
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; et al.,
Petitioners,
v.

MATTHEW N. FRASER, a Minor; et al.,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION;
NATIONAL SCHOOL SAFETY CENTER; AMERICAN
ASSOCIATION OF SCHOOL ADMINISTRATORS; NATIONAL
ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;
NATIONAL ALLIANCE FOR SAFE SCHOOLS; INTERNATIONAL
ASSOCIATION OF EDUCATIONAL PEACE OFFICERS;
NATIONAL ASSOCIATION OF SCHOOL SECURITY
DIRECTORS; CALIFORNIA SCHOOL PEACE OFFICERS
ASSOCIATION; CENTER FOR EDUCATIONAL LEADERSHIP;
DR. STUART GOTHOLD, SUPERINTENDENT OF
LOS ANGELES COUNTY SCHOOLS, CALIFORNIA;
HERBERT SANG, SUPERINTENDENT OF DUVAL COUNTY
SCHOOLS, FLORIDA; DR. FLORETTA MCKENZIE,
SUPERINTENDENT OF DISTRICT OF COLUMBIA SCHOOLS;
SAN DIEGO UNIFIED SCHOOL DISTRICT; AND VICTIMS
ASSISTANCE LEGAL ORGANIZATION IN SUPPORT OF
PETITIONER, BETHEL SCHOOL DISTRICT NO. 403, ET AL.**

INTERESTS OF AMICI

This brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties; the letters of consent have been lodged with the Clerk of this Court.

The identities and interests of amici are as follows:

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in weighing the rights of individual students against those of other students and of school authorities will help provide this Court with additional argument to review the holding of the Ninth Circuit Court of Appeals in this matter.

The National School Safety Center, a nonprofit partnership between the United States Departments of Justice and Education and Pepperdine University, is formally funded by the federal Office of Juvenile Justice and Delinquency Prevention. This partnership, which the National School Safety Center represents nationwide, was established to promote proactive cooperation between the nation's legal, law enforcement, and education communities to positively and effectively address the problems of crime, violence, vandalism, discipline, and truancy disrupting our nation's schools.

Because this case, *Bethel School District No. 403 v. Fraser*, is expected to be a landmark decision, with a direct impact on the ways and means schools must structure and impose discipline, the center, with its national mandate, and its co-amici, with their manifest responsibilities, hope

to positively assist the Court to respond in the most reasonable and effective manner.

The American Association of School Administrators (AASA) is a professional association representing more than 17,000 educational leaders in North America and other parts of the world. AASA is dedicated to enhancing the professionalism of educational leaders who are the key to excellence in our schools and who generally have the ultimate administrative responsibility for supervision of disciplinary practices in schools. AASA members are responsible for a major proportion of the nation's 100,000 schools, 2.4 million teachers, and 44 million students. AASA members are directly influenced by court decisions which deal with relevant legal issues, discipline, suspension, and expulsion procedures.

The National Association of Secondary School Principals (NASSP) is a professional organization representing more than 35,000 site administrators who administer the nation's middle-level and senior high schools. NASSP's members are directly responsible for the safety and education of our nation's youth. NASSP members are responsible for a major proportion of the nation's 100,000 schools, 2.4 million teachers, and 44 million students. They are the line administrators most responsible for the day-to-day implementation of disciplinary practices in the schools. Every court decision regarding student discipline, suspension, and expulsion directly influences the membership of NASSP.

The National Alliance for Safe Schools (NASS) is a nonprofit corporation representing a coalition of educators, law enforcers, and others. NASS provides public information, training, technical assistance, research, and publications about school crime prevention. NASS represents

210 school security directors from all 50 states and the District of Columbia. NASS membership is responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. The work of NASS is directly influenced by court decisions regarding student discipline, suspension, and expulsion procedures.

The International Association of Educational Peace Officers (IAEPO) is a professional organization representing a membership of 75 leading professionals from 20 states and 2 foreign countries. IAEPO members are responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. IAEPO members are directly influenced by court decisions which deal with issues of student discipline, suspension, and expulsion procedures.

The National Association of School Security Directors (NASSD) is a professional organization representing a membership of 150 professionals from 30 states. NASSD membership is responsible for the safety and well-being of millions of students, teachers, and staff on campuses throughout America. NASSD members are directly influenced by court decisions regarding student discipline, suspension, and expulsion procedures.

The California School Peace Officers Association (CSPOA) has a membership of more than 300 school security personnel representing 88 school districts throughout California. The members of CSPOA are responsible for the safety of hundreds of thousands of students, teachers, and staff, for enforcement of the law and countless

school district policies and procedures. CSPOA's members are directly influenced by court decisions involving student discipline, suspension, and expulsion procedures.

The Center for Educational Leadership is a university-based consulting and research consortium which provides training to improve the education profession at all levels. This center helps school, community college, and university leaders more effectively function at their individual sites. This center's clients are directly influenced by court decisions which deal with student discipline, suspension, and expulsion procedures.

Dr. Stuart Gothold is the Superintendent of the Los Angeles County, California, Office of Education. This office comprises the second largest urban school district in the nation and includes 82 school districts, 1,820 schools, 48,899 teachers, and 1,275,041 students. This office is responsible for reviewing suspension, expulsion, and discipline policies to ensure statutory and constitutional compliance by the 82 districts. Therefore, court decisions, such as *Bethel*, directly impact this office.

Herbert Sang is the Superintendent of the Duval County, Florida, Public School District. The district includes 141 schools, approximately 5,000 teachers, and more than 100,000 students. Every school district in America must adhere to court decisions regarding discipline policies, and suspension or expulsion procedures. Therefore, court decisions, such as this one, directly influence the Duval County Public Schools.

Dr. Floretta McKenzie is the Superintendent of the Washington, D.C., public schools. This district includes 184 schools, 5,242 teachers, and 87,677 students. Since every school district in America must adhere to court

decisions regarding discipline, suspension, and expulsion procedures, all legal decisions, such as this one, directly influence the Washington, D.C., public schools.

The San Diego Unified School District is the eighth largest urban school district in the nation and includes 150 schools, 6,000 teachers, and 113,000 students. Its superintendent is Dr. Thomas Payzant. Since every school district in America must adhere to court decisions regarding discipline, suspension, and expulsion procedures, all relevant legal decisions, such as this one, directly influence the San Diego Unified School District.

The Victims Assistance Legal Organization (VALOR) is a national clearinghouse of information for attorneys who represent crime victims, including elementary, junior, and senior high school crime victims. VALOR helps promote safe, secure, and peaceful schools, and recognizes there can be no effective learning without positive campus climates. VALOR believes there will be increased numbers of elementary, junior, and senior high school campus crime victims if the lower appellate court decision in this case is not reversed. To improve campus climate and decrease campus crime victims, schools must have flexibility and control of their campuses, without the omnipresent specter of potential litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 755 F.2d 1356 (9th Cir. 1985).

STATEMENT OF THE CASE

This case presents the issue of whether a student, because of his immaturity and the special purposes of public schools, may be subject to more stringent regulations than an adult outside the school environment. This case also raises the question of the role of school officials in maintaining an environment conducive to learning.

Matthew Fraser, a senior at Bethel High School in Washington state, spoke before 600 students at an all-school assembly. The students, between the ages of 14 and 18, were given a choice of attending either the assembly or a study hall. In his speech on behalf of a candidate for student body vice president, Fraser, as he later testified, deliberately used sexual innuendo in hopes that the students would perceive his sexual references. He succeeded, as students in the audience hooted and yelled and simulated masturbation and sexual intercourse. An independent educational expert testified at trial that Fraser's speech was sexually harassing to female students and disruptive to the learning process.

The following day Fraser was given oral and written notice that the school believed he had violated the school's disruptive conduct rule. After a hearing, Fraser was suspended for three days and informed that his name would be removed from consideration as a candidate for commencement speaker. When Fraser filed suit against the school district, the District Court found that the suspension violated Fraser's First Amendment rights of free expression, that the school's disruptive conduct rule was unconstitutionally vague and overbroad, and that the failure of the disciplinary rules to specify removal of names for

graduation speaker consideration violated due process. The decision was affirmed by a divided Ninth Circuit panel.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion in this case has raised substantial questions regarding the role of school officials in maintaining a school environment conducive to the preparation of individuals for participation in society and in inculcating fundamental community values. This case involves the issue of the extent to which the state's control over the conduct of children may reach beyond the scope of its authority over adults.

The legitimate and essential goals of public education are multiple. Public schools do not limit their function to "reading, writing, and arithmetic" but teach community values, including social and moral values. *Board of Education v. Pico*, 457 U.S. 853, 864 (1982). This unique demand placed on public schools requires an environment in which learning and social maturation can occur. To achieve this goal we must give "freedom to the teachers to teach and of students to learn," *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), in an environment free of disruption. This cannot be done if school authorities are prevented by the courts from maintaining a reasonable yet swift and informal discipline procedure.

Amici take the position that students do have rights which are protected by the Federal Constitution and they do not shed them at the schoolhouse gate, *Tinker v. Des Moines Independent Community School District*,

393 U.S. 503, 506 (1968), yet it is necessary to balance these students' rights against the special school environment where disciplinary, health, and safety considerations relating to minors take on special significance.

Amici stress that school administrators and personnel are professionally trained individuals who are competent and dedicated experts in the field of education. The courts lack this special knowledge and should let stand decisions by these experts as to what is and is not required in the day-to-day administration of the schools unless these decisions clearly abuse students' constitutional rights.

Further, amici take issue with the Ninth Circuit requirement that school disciplinary rules must meet the same due process standard as criminal statutes. If this were so, specific description of all prohibited language and conduct, as well as the resulting discipline, would have to be set forth in each student's rule book. This would take away the necessary flexibility school officials require for maintaining security and order in schools and to meet each situation on a case-by-case basis. Also, by placing the specific, prohibited language and conduct in the student's handbook, it may tempt the student to engage in this prohibited conduct and could shock both parents and students with its descriptions.

Amici urge this Court to reverse the Ninth Circuit's opinion which places a straightjacket on school officials and adopt instead a standard of reasonableness for the implementation and enforcement of school conduct rules.

ARGUMENT**I****THE NEEDS OF THE EDUCATION PROCESS
LIMIT A STUDENTS' RIGHT OF FREE SPEECH****A. Students' Free Speech Rights May Be
Reasonably Limited to Meet the Needs
of the School Environment**

This case examines the scope and extent of the right of public school students to speak freely in the school environment in relation to the authority of school officials to prevent disruption and maintain reasonable standards of student deportment. This Court in *Board of Education v. Pico*, 457 U.S. at 864, recognized that local school boards have broad discretion in the management of school affairs, but this discretion must be "exercised in a manner that comports with the transcendent imperatives of the First Amendment." While the role of the First Amendment is to foster individual self-expression, all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 506.

In *Tinker* this Court gave recognition to the exercise by students of the right of freedom of speech within a public school environment.

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

However, these rights of students must be balanced against the right—indeed the obligation—of school authorities to

administer the school and discipline the students. Thus this Court continued:

"On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507.

Tinker resolved the conflict between these competing rights by declaring that the student may exercise his right to freedom of expression unless the "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

The Ninth Circuit in considering Fraser's speech stated: "[W]e fail to see how we can distinguish this case from *Tinker* on the issue of disruption." 755 F.2d at 1360. But in ignoring the hooting and yelling and sex act simulations engendered by Fraser's speech, that court failed to heed this Court's admonition:

"The problem posed by the present case does not relate to . . . deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'" *Tinker*, 393 U.S. at 507-08.

It is therefore necessary to look beyond *Tinker* to determine the type of behavior not protected.

In *Board of Education v. Pico*, 457 U.S. 853, this Court was asked to decide what were the First Amendment restrictions on a decision of a local school board to remove from junior and senior high school libraries books

which were not obscene in a constitutional sense but were considered by some to be “ ‘anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.’ ” *Id.* at 857. In remanding the case for trial, the plurality opinion by Justice Brennan stated:

“[L]ocal school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’ ” *Id.* at 872.

Nevertheless, the plurality noted that a decision to remove the books simply because they were pervasively vulgar or educationally unsuitable would be constitutionally permissible. *Id.* at 871. It follows that absent an impermissible motive to suppress ideas or impose political orthodoxy, school districts should be able to classify disruptive speech that is based on sexual innuendo as improper at a school assembly and take reasonable steps to restrict such activity.

B. School Authorities May Place Reasonable Time, Place, and Manner Restrictions on Speech to Protect the School Environment from Disruption

Generally, it has been recognized that the state may place reasonable time, place, and manner restrictions on speech that takes place in the public forum, so long as these regulations are without regard to content. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). There this Court noted:

“In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the

regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, “ “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” ” ” ” *Id.* at 46 (citations omitted).

Obviously, a public school is not a traditional public forum as is a street or park. The public school during schools hours does not make its facilities generally available. Rather, school authorities can reserve the facility for its intended purpose, that is education.

The all-school assembly in this case was part of the students' education to foster participation in self-government. The speeches were for the limited purpose of nominating candidates. It is critical to note that the school in deciding to discipline Fraser for his speech did not discriminate against the substantive content of the speech, which was the nomination of a candidate, but rather the manner in which it was given. Fraser's political views were not punished, merely the offensive manner in which he expressed himself at a time when students were gathered for a school assembly.

**C. Indecent Speech in the School Environment
Undermines School Officials' Efforts to
Maintain Minimum Standards of Behavior and to
Protect Unsuspecting and Unwilling Listeners**

Fraser's speech was replete with intentional sexual innuendo, inappropriate in the school assembly setting. In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that the Federal Communications Commission may regulate a radio

broadcast which is "indecent" but not "obscene." In that case, a radio station broadcast for nearly 12 minutes a record of a George Carlin monologue during the early afternoon when children were likely to be in the audience. During this monologue, Carlin repeated words containing sexual and excretory language. Five members of this Court agreed that broadcasting receives "the most limited" free speech protections of all forms of communication because it is "a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read." *Id.* at 749. As Justice Powell wrote in a separate opinion, "the result turns . . . on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years" *Id.* at 762.

The school context is at least equally pervasive in the lives of children and must be subject to at least the same level of regulation as broadcasting. This Court in *Pacific* found that the individual's right to be left alone, free from patently offensive, indecent material plainly outweighs the First Amendment rights of an intruder. *Federal Communications Commission*, 438 U.S. at 748.

Here Fraser subjected the students to a speech containing sexually suggestive and sexist connotations. These students and their teachers had no choice but to sit and endure Fraser's conduct during the assembly. The school authorities had a legitimate concern in regulating "conduct by the student . . . which . . . whether it stems from time, place, or type of behavior . . . involves . . . invasion of the rights of others." *Tinker*, 393 U.S. at 741. The

administration further felt the necessity to dispel any inference of school approval.

Fraser's performance created a collision with the rights of other students, an undermining of authority, and a lack of order, discipline, and decorum. "The proper operation of public school systems is one of the highest and most fundamental responsibilities of the state." *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749, 754 (5th Cir. 1966). The school authorities in this case had a legitimate and substantial interest in the orderly conduct of school activities and a duty to protect such substantial interest in the school's operation.

II

COURTS SHOULD NOT INTERFERE IN DAILY SCHOOL OPERATIONS ABSENT AN ABUSE OF BASIC CONSTITUTIONAL RIGHTS

It must be recognized that a student is subject to far more stringent regulations than an adult outside a school environment. This Court stated in *Ginsberg v. New York*, 390 U.S. 629, 638 (1968), "where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'"

By and large, public education is committed to the control of state and local authorities. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and *which do not directly and sharply* implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. at 104 (emphasis added).

In approaching this subject it must be recognized that school administrators and personnel are professionally

trained individuals who are experts in the field of education. Because judges lack such expertise, in the absence of very clear abuse by school authorities, bordering on capriciousness, arbitrariness, or bad faith, the courts should let stand these administrative decisions as to what is required in the day-to-day operation of the school. "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). A court may disagree with the judgment of school officials, but such disapproval provides no license or authorization to usurp the school officials' authority by substituting the court's judgment for that of the school.

III

A REASONABLENESS STANDARD MUST APPLY TO SCHOOL CONDUCT RULES

A. School Disciplinary Rules Must Be Sufficiently Flexible to Maintain Orderly Conduct

While the students' right to express and communicate ideas is protected by the First Amendment, this right must be balanced against the need for reasonable regulations to maintain orderly conduct during the school session. *Tinker* holds at 393 U.S. at 513: "The Constitution says that Congress (and the States) may not abridge the right to free speech. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances."

Amici submit that a school regulation is reasonable if it is "essential in maintaining order" and discipline on

school property and "measurably contributes to the maintenance of order and decorum within the educational system." *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

The school's disruptive conduct rule provides:

"In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.

"*Disruptive Conduct.* Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." 755 F.2d at 1357 n.1 (emphasis in original).

The Ninth Circuit concluded that this rule was unconstitutional on its face. 755 F.2d at 1365 n.12. Yet it is plain that this disruptive conduct rule is neither unconstitutionally vague nor overbroad.

A statute will be void from vagueness if the conduct forbidden by it leaves one without clear guidance so that a person "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This doctrine is appropriate when considering the due process standards for criminal statutes; however, school district rules cannot be drafted with the same specificity. Articulation and enforcement of school disciplinary codes require a substantial degree of discretion to be left in the hands of school officials. The Fifth Circuit held in *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 442 (5th Cir. 1973), that "[a]bsent evidence that the broad wording in the statute is, in fact, being used to infringe on

First Amendment rights . . . we must assume that school officials are acting responsibly in applying the broad statutory command."

The school conduct rules must be flexible in light of the unique demands placed upon the state in its role as educator, including the need to maintain an environment in which learning and social maturation can occur. In this case, the rules prohibit conduct that materially and substantially disrupts the educational process. The language of the rule is sufficient to put a student on notice that lewd language offensive to modesty or decency is prohibited. Fraser's deliberate use of sexual innuendo is precisely the type of conduct the rule prohibits. The rule, therefore, is not unconstitutionally vague.

Nor is the rule subject to challenge under the overbreadth doctrine. An overbroad rule is one that is designed to burden or punish activities that are constitutionally protected, including within its scope activities protected by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940). As stated earlier, this Court has recognized that school districts may constitutionally prohibit certain conduct that would otherwise be protected by the First Amendment. *See, e.g., Tinker*, 393 U.S. at 513. Further, the rule on its face is content neutral and seeks only to further the legitimate end of preventing disruption. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), declares: "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the . . . ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity. . . .'" Citing *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969).

Amici stress that even though the rule does not state what conduct is prohibited with the degree of specificity that the Ninth Circuit would require, it is clearly apparent from the rule's announced purpose that preventing disruption of the school environment is paramount. The nature of the school environment makes this type of rule reasonable. Fraser's speech might be appropriate in a park but was clearly disruptive in the school environment. Therefore, in restricting such misbehavior it is clear that this rule is not substantially overbroad.

B. A Standard of Reasonableness Is Required to Give School Officials the Necessary Flexibility to Maintain Order in the School Environment

In *New Jersey v. T.L.O.*, — U.S. —, 105 S. Ct. 733 (1985), this Court stated: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." This Court stressed the need to balance the students' legitimate expectation of privacy guaranteed by the Fourth Amendment on one side against the "need for effective methods to deal with breaches of public order" on the other side. Amici take the position that the same standards of reasonableness should apply to school conduct rules. It is necessary to balance the substantial public interest reposed in teachers and administrators in maintaining an atmosphere free of disruption against the students' guarantee of free speech. As this Court stated in *T.L.O.*:

"[T]he preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. . . . Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *Id.* at 742-43.

The standard required by the Ninth Circuit is unworkable. It would require each student's handbook to define specifically the types of language and conduct prohibited. This would create an inflexible standard for school officials to follow, possibly tempt students to engage in the prohibited conduct, and offend by the nature of such language many of the students and parents. It is urged by amici that the rigid specificity requirement in rules of school conduct demanded by the Ninth Circuit be replaced by a standard of reasonableness in determining whether the stated purpose of the rules provides sufficient notice to students of conduct not tolerated in public schools. The school officials must rely on the circumstances of each incident in determining the appropriate action to be taken. Without this flexibility the ability of the school officials to maintain order is unduly burdened. As this Court held in *T.L.O.*:

"By focusing attention on the question of reasonableness, th[is] standard . . . [will] permit them [school officials] to regulate their conduct according to the dictates of *reason and common sense*. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 744 (emphasis added).

In this case, the rules prohibit conduct which would materially and substantially interfere with the educational process. The rule goes on to give an example of prohibited conduct—use of obscene, profane language or gestures. Had Fraser been uncertain of what was deemed obscene he could have looked it up in a dictionary. The everyday common meaning of obscene is “grossly repugnant to the generally accepted notion of what is appropriate.” *Webster’s Third New International Dictionary* 1557 (1971). This would have put Fraser on notice that his intentional use of sexual innuendo before an all-school assembly would fall within the conduct prohibited by the disruptive conduct rule.

Amici therefore urge this Court to find the Bethel High School disruptive conduct rule constitutional and the standard for applying similar rules be one of reasonableness.

CONCLUSION

Students have rights which are protected by the Federal Constitution and they do not shed them at the school-house gate. Yet it is the responsibility of school authorities to promulgate rules and regulations governing the conduct and operations of schools, including those relating to disruptive behavior in order to ensure an atmosphere conducive to the learning process. These conflicting needs have to be balanced and a standard of reasonableness established lest the specter of chaos raised by Justice Black’s dissent in *Tinker* be realized. 393 U.S. at 524-25.

When school administrators and teaching experts are confronted with conduct, whether oral or physical, which is disruptive of the educational process, and such disturbance has a prejudicial effect on the educational environment, and an adverse effect on other students, the academic system will best be served if our school officials are allowed to discharge their "important, delicate, and highly discretionary functions," *id.* at 507, within the limits and constraints of the Federal Constitution.

This is of critical import because the nation's school authorities must administer more than 100,000 schools, 2.4 million teachers, and 44 million students on a daily basis while supervising an annual budget of \$200 billion. To substitute a wooden rigidity for reasonableness in disciplinary processes, as would the Ninth Circuit, in the face of such huge numbers and attendant responsibilities, is unworkable, even absurd. Amici therefore urge that the decision of the Ninth Circuit be reversed.

DATED: November, 1985

Respectfully submitted,

RONALD A. ZUMBRUN

JOHN H. FINDLEY

COUNSEL OF RECORD

Pacific Legal Foundation

555 Capitol Mall, Suite 350

Sacramento, California 95814

Telephone: (916) 444-0154

GEORGE NICHOLSON

Chief Counsel

National School Safety Center

7311 Greenhaven Drive, Suite 100

Sacramento, California 95814

Telephone: (916) 427-4600

Attorneys for Amici Curiae

No. 84-1667

Supreme Court, U.S.

FILED

DEC 2 1985

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1985

Bethel School District No. 403, et al,
Petitioners,

v.

Matthew N. Fraser, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate Executive Director
and General Counsel

THOMAS A. SHANNON
NSBA Executive Director

BEST AVAILABLE COPY

43182

TABLE OF CONTENTS

	PAGE
INTEREST OF <u>AMICUS CURIAE</u>	2
ISSUES PRESENTED FOR REVIEW.....	4
STATEMENT OF THE CASE.....	5
ARGUMENT.....	5
I. Introduction.....	5
II. School Boards, Not Courts or Students, Properly Prescribe Rules of Conduct and Decorum.....	6
III. The <u>Tinker</u> Standard Permits Regulation of Student Speech Outside The Classroom.....	16
A. <u>Tinker</u> standard applies only to political speech..	16
B. The school assembly is not a student-initiated "volun- tary" activity.....	19
C. School boards have the duty to protect the students from indecent speech.....	22
IV. School Environment Requires Regulation Of Student Speech Even Though Not "Obscene" Under Adult Standards.....	24

V.	School Rule Prohibiting "Obscenity" Is Not Unconsti- tutionally Vague.....	31
VI.	Conclusion.....	33

TABLE OF AUTHORITIES

CASES:	PAGE
<u>Bender v. Williamsport</u> , 741 F.2d 538 (3rd Cir.1984), <u>cert. granted</u> , Feb. 19, 1985.....	22
<u>Board of Education, Island Trees Union Free School District v. Pico</u> , 457 U.S. 853, 102 S.Ct. 2799 (1982)...	21
<u>Board of Education of Rogers, Ark. v. McCluskey</u> , 458 U.S. 966, 102 S.Ct. 3469 (1982).....	32
<u>Milliken v. Bradley</u> , 418 U.S. 717, 741 (1974).....	6
<u>New Jersey v. T.L.O.</u> , 105 S.Ct. 733 (1985).....	16
<u>Federal Communications Commission v. Pacifica Foundation</u> , 438 U.S. 726 (1978).....	20
<u>Tinker v. Des Moines Independent School District</u> , 393 U.S. 503 (1969)..	16
<u>Trachtman v. Anker</u> , 563 F.2d 512 (2d Cir. 1977), <u>cert. denied</u> , 435 U.S. 925 (1977).....	18
U.S. CONSTITUTIONAL PROVISIONS:	
U.S. Const. Amendment I.....	<u>passim</u>
U.S. Const. Amendment XIV.....	31

STATUTES:

Ala. Code § 16-1-114.....	9
Alaska Stat. § 14.30.045(2).....	9
Ark. Stat. Ann. § 80-1516.....	9
Ariz. Rev. Stat. Ann. § 15-841B.....	10
Calif. Educ. Code § 48900 (q).....	10
Hawaii. Rev. Stat. § 298-11.....	9
Iowa Code § 282.3.....	9
Ky. Rev. Stat. § 158.50(1).....	10
Mo. Rev. Stat. § 167.161.....	9
N.J. Stat. Ann. § 18A:37-2.....	10
N.Y. Educ. Code § 3214,3(1).....	9
Ok. Stat. § 24-101.....	10
Or. Rev. Stat. § 339.250(4).....	10
S.C. Code § 59-63-210.....	10
Tenn. Code Ann. § 49-6-3401(2).....	10
W. Va. Code § 18A-2-2.....	10

OTHER AUTHORITIES:

- Developing An Effective Dress and Behavior Code, National Association of Secondary School Principals Bulletin, Reston, Virginia, January, 1983..... 13
- Values Inculcation in Public Schools, 13 Journal of Law & Education, 523, 525 (Oct. 1984)..... 8



No. 84-1667

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Bethel School District No. 403, et al,
Petitioners,

v.

Matthew N. Fraser, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief amicus curiae in
support of Petitioners is submitted with
the written consents of counsel to all
parties. Letters of consent are on file

with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for

the fiscal management, staffing, continuity, educational productivity and standards of conduct of the public schools within their jurisdictions.

NSBA submits this brief in the belief that the school boards of this country are charged with the responsibility for, not only the education of the children within their charge, but also the inculcation of moral values of the community in which they are located.

School boards are responsible for setting the standards of conduct for the students, based upon the moral and ethical standards of the community. As publicly supported institutions, public schools are responsible to the parents and other members of the community to assure that the students, who are required to attend school, are subject to the rules of the

community.

Amicus believes that the opinion below evidences a lack of understanding of the mission of the public schools and, if allowed to stand, will result in the imposition on the schools of a court-imposed standard of conduct. Thus, the standard would be immune from the political process where school boards act for and on behalf of parents and other members of the community.

ISSUES PRESENTED FOR REVIEW

1. Do school boards have the discretion, under the U.S. Constitution, to interpret their own rules prohibiting the use of "obscene" language during school activities?

2. Is a school board rule prohibiting "obscene" language and gestures constitutionally infirm in the

absence of an explicit definition of "obscene" in the rule itself?

STATEMENT OF THE CASE

Amicus incorporates by reference the statement of the case contained in brief filed herein by Petitioners.

ARGUMENT

I. INTRODUCTION

The raison d'etre of school boards in this country is to assure that parents and other taxpayers in the community have a voice in the most important service provided by the state to its citizens - a free public education.

Parents are required by the state to entrust their children into the care of the public schools and the parents have a right to assume that the community's moral and educational values are observed and reinforced by the schools through

enforcement of the student code of conduct.

An affirmation of the decision below would nullify the power of the board and those charged with the education of the students - teachers, principals and the superintendent - from enforcing reasonable rules based upon community standards of decorum.

II. SCHOOL BOARDS, NOT COURTS OR STUDENTS, PROPERLY PRESCRIBE RULES OF CONDUCT AND DECORUM

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.... Milliken v. Bradley, 418 U.S. 717, 741.

Although school boards, like other public officials, must adhere to the

commandments of the U.S. Constitution, this Court has traditionally acknowledged that the environment of the elementary and secondary level school may necessitate the adoption of different rules than apply in other public places. Students have, at once, more rights and less rights than other citizens. Because they are required to attend school, the state has a duty to protect them while they are on school premises. The mandatory attendance laws also limit students' rights by restricting their freedom to come and go at will and by imposing certain rules of decorum which do not govern the behavior of other members of society.

Perhaps equally important as the school district's obligation to set academic standards is the duty to inculcate moral values, beliefs, and

ideology. State constitutions in their provisions creating a system of public schools include references to the importance of the inculcation of moral values. For example, the North Dakota Constitution states: "In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind." N.D. Const. art. VIII, section 3. For a discussion of other constitutional provisions see Gordon, Values Inculcation in Public Schools, 13 Journal of Law & Education, 523, 525 (Oct. 1984).

State legislatures have recognized the need for school districts to exercise disciplinary control over public school

students. Over two-thirds of the states statutorily grant school authorities the power to establish rules, regulations, and standards governing student conduct and disciplinary procedures. Most of the thirty-six statutes which endow schools with this authority speak in broad terms of maintaining an orderly atmosphere conducive to the schools' academic purposes. Some of the states also clearly place in the schools the responsibility to protect the moral welfare of their students by disciplining those whose behavior becomes detrimental to this purpose or is itself "immoral." See, e.g., Ala. Code section 16-1-114; Alaska Stat. section 14.30.045(2); Ark. Stat. Ann. section 80-1516; Hawaii Rev. Stat. section 298-11; Iowa Code section 282.3; Mo. Rev. Stat. section 167.161; N.Y. Educ.

Code section 3214,3(1); Ok. Stat. section 24-101; S.C. Code section 59-63-210; W.Va. Code section 18A-2-2.

Six states specifically list the use of vulgar or profane language by students as a legitimate cause for disciplinary action. Ariz. Rev. Stat. Ann. section 15-841B; Calif. Educ. Code section 48900(q); Ky. Rev. Stat. section 158.50(1); N.J. Stat. Ann. section 18A:37-2; Or. Rev. Stat. section 339.250(4); Tenn. Code Ann. section 49-6-3401(2). While three of these states, Arizona, California and New Jersey, indicate that only "habitual" use of such language warrants discipline, the other three permit school authorities to take disciplinary measures against any use of profanity or vulgarity.

The Bethel High School Disruptive

Conduct Rule, which prohibits "obscene, profane language or gestures," is a common rule found in many school district codes of conduct. In addition, school codes often include other provisions relating to decorum such as dress codes which prohibit the wearing of clothing which is "indecent, inappropriate or a safety hazard." These rules rarely, if ever, explain what is intended by the word "obscene," "profane" or "indecent" although undoubtedly the students know their meaning.

The court of appeals below placed great weight on a belief that the students attended the assembly in question "voluntarily" and that they indicated their approval of Fraser's speech by voting for him for graduation speaker. This analysis indicates that the court

sorely lacks an understanding of public schools and young people.

Neither the curriculum of the schools nor its code of conduct should be subjected to some kind of mandatory student plebiscite. Indeed parents and educational officials in the Bethel community would be justifiably outraged had the school district relinquished its disciplinary authority to a vote of the students.

An interesting study was conducted by a school principal in 1983 in order to determine the views of teachers, students and community members as to what should be included in a student conduct code. Although students' and adults' views were similar on matters such as stealing, they widely diverged on the question of whether students should be disciplined for using

"obscene or inappropriate language, spoken or written, or gestures on school grounds." While 96% of parents, 91% of non-parents and 100% of teachers answered "yes," only 59% of the students replied "yes." The same dichotomy existed as to whether students should be prohibited from wearing "bare midriffs, halter tops, tube tops, shorts or cut-offs." Ninety-three percent of parents, 91% of non-parents, 100% of teachers and 38% of students answered "yes." Slaby, Developing an Effective Dress and Behavior Code, National Association of Secondary School Principals Bulletin, Reston, Virginia, January, 1983.

Amicus cites this study, not as definitive authority, but only to illustrate what should have been obvious to the courts below - that students have a

different view from parents and school officials as to what should be included in a student code of conduct. And, the fact that students view conduct as appropriate is no reason for the courts to rule, as a matter of law, that the students' views should control. While students do not "shed their rights at the schoolhouse door," neither do their first amendment rights endow them with the right to adopt their own rules of conduct. That is the province of the elected representatives of the parents and other adults in the community.

This maxim of school board control over the operation of our public schools has repeatedly received the affirmation of this Court. The Court has properly recognized the importance of that control and has admonished the courts not

"second guess" school board rules, in the absence of clear constitutional infractions.

The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. [Citations omitted.] The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the

schools and rules that are not."
New Jersey v. T.L.O., 105 S.Ct.
 733, 744 at footnote 9 (1985).

III. THE TINKER STANDARD PERMITS REGULATION OF STUDENT SPEECH OUTSIDE THE CLASSROOM

A. Tinker standard applies only to political speech.

The lower court relies on Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) for its decision holding that a school board may not regulate any student speech outside the classroom in absence of a showing that the speech causes "substantial and material disruption."

The rules established in Tinker do not apply to the case at bar for two reasons: first, Tinker dealt with political speech rather than "obscenity;" and second, the Tinker speech was not related to any school-sponsored activity,

unlike the student assembly here. Both of these factors were crucial to the holding in the case.

In Tinker, this Court emphasized the fact that the school district had not prohibited wearing of all armbands, or of buttons or T-shirts with statements thereon, but had singled out black armbands worn as a symbol of the students' disagreement with the Viet Nam War -- a political statement. Although noting that in general students' first amendment rights in the public school context are not the same as those of adults, the Court held that as to silent political statements, a student's free speech right differs little in the school context than outside the classroom. That form of speech cannot be regulated except as to "time, place and manner" and so as to

prohibit "substantial and material disruption."

Thus, the reliance on the Tink criterion of "substantial disruption" is misplaced in this case as it should apply only to regulation of political statements.

The fact that the statement at issue was made during a political nomination speech is irrelevant to the controlling fact that the regulation by the school board was as to its "obscenity" not its political content.

Although lower court decisions dealing with political speech of students are quite consistent, they diverge in their application of the "substantial disruption" standard to speech which raises questions of obscenity or morality. For example, in Trachtman v. Anker, 5

F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977) the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey might invade the privacy of younger students, who might not be mature enough to handle the story's intimate information.

B. The school assembly is not a student-initiated "voluntary" activity.

The lower court, drawing a distinction between the classroom and the school assembly, holds that the Supreme Court standards for determining what is "obscene" apply equally to student speech in the context of school assemblies. In other words, the court believes that the

regulation of student speech in school assemblies requires a more stringent standard than that operating in the classroom. In the court's view a student might be prohibited from saying something "indecent" in a classroom, but he could say anything, even something barely above the adult line of "obscenity," in a school assembly without fear of disciplinary action.

In Federal Communications Commission v. Pacifica Foundation, 438 U.S. 72 (1978), this Court held that the F.C.C. may regulate radio broadcasts which are "indecent" because of the harm caused to young children involuntarily subjected to the programs in the home. The lower court, however, distinguishes the home environment from the school assembly because the school assembly is

"voluntary" student-initiated activity. But this distinction is meaningless. Just as a child may not be able to control the speech broadcast into his home, he cannot control the speech he hears in a student assembly and cannot leave to avoid it.

The lower court also attempts to analogize the so-called "voluntary" school assembly to the school library which was the subject of this Court's decision in Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982). In that case four Justices drew a distinction between the classroom and the library on the basis of the "voluntary" nature of the library.

However, Island Trees asserts that political speech in the library cannot be censored. But, assuming arguendo that Island Trees prohibited all censorship of

library books, the analogy is still misplaced. It cannot be said that a student "voluntarily" subjects him/herself to spoken speech of other students in a school assembly in the same manner that a student voluntarily picks up a book in a library. Although the students at Bethel had the option of attending the assembly or a study hall, once they elected to attend, they were not permitted to leave.

C. School boards have the duty to protect the students from indecent speech.

Unlike the case of student initiated non-school sponsored clubs, such as those in Bender v. Williamsport, 741 F.2d 984 (3rd Cir. 1984), cert. granted, Feb. 1, 1985, where it might be argued that a school has created a limited open forum for the activities in a school assembly sponsored by the school and there may be

be said to be an endorsement by the school administration of much of what transpires during the assembly. Students might not perceive school endorsement of the political remarks made by students regarding the merits of one candidate over another. But, they are likely to perceive an endorsement, or at least a lax attitude, toward inappropriate or vulgar remarks made by a student speaker if the student is not disciplined for the remarks - regardless of whether those statements reach the level of "obscene" under Supreme Court rulings.

In addition to the question of "endorsement" of activities in the assembly, the school administration had an additional concern that students not be subjected to non-political speech which is offensive to them. Whatever a majority of

the students, particularly the male students, may have thought about Frase's remarks, it is a reasonable assumption that a number of the females in the audience were offended, particularly the younger girls. And, the girls would have been less likely to complain than the boys. Those girls, as well as their male counterparts who might be offended, have the right to expect the administration of the school to protect them from "indecent" remarks, particularly since they were free to leave the auditorium.

**IV. SCHOOL ENVIRONMENT REQUIRES
REGULATION OF STUDENT SPEECH EVEN
THOUGH NOT "OBSCENE" UNDER ADULT
STANDARDS**

It is unreasonable to require school boards to apply the same standards of "obscenity" which are used outside the school setting. School boards char-

with guarding the moral welfare of students should have much greater flexibility in the adoption and implementation of rules which regulate "obscene" speech in the public school setting and certainly within the context of official school-sponsored programs. The court of appeals cites examples from Tinker of the playing field. That example is inapposite in that students might be permitted to use language there which would not be allowed in a school-sponsored game or athletic contest.

It is the view of the lower court that the school district is powerless to regulate indecent or inappropriate language of students, unless it is "obscene" within the Supreme Court standards applied to printed adult materials. Having decided that Fraser's

remarks were not "obscene," the court notes that the the question of whether "went over the line of good taste and became offensive" will be judged by the student body "when they cast ballots at the school elections." The court then points out that Fraser's candidate went on to win the election.

It is indeed discouraging that a federal court of appeals could seriously contemplate a notion that a group of high school students (which in many schools could include students as young as 13 or 14), through majority vote, should be given the absolute authority to overrule the officials of the school district as to the appropriateness of the admittance of "sexual innuendo" in a student's speech.

Whatever one may believe as to the severity of the punishment which Fraser

received, or as to the merits of the speech or its clever turn of phrase, the standard set by the court below is absurd.

In society at large minors do not have the right of access to all types of speech freely available to the adult community. Nor do those who supply these forms of speech have the right to provide them to minors. The point is, we do not ask children in a larger public context whether they approve of, or want to be exposed to, a particular form of speech in order to determine the need to regulate their access and exposure to that speech. Nor is the essential question whether the speech is obscene by adult standards, but whether the speech may in some way be harmful to the welfare of children. Why the court of appeals feels that adult obscenity standards should apply in the

public schools is beyond reason.

Therefore, if a vote is in order, it is the parents and other adult members of the community who should cast it. If they believe the standards set by the Bethel school district are too conservative, it is their ballots which are relevant. Courts cannot, because of their own personal beliefs, suppress the right of the local community to elect its own local school board to set standards for their children, who are required by state law to attend the school.

The court below notes its concern that if school officials are given the "unbridled discretion" to apply local standards of decency, "it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior

in our public schools."

Amicus respectfully takes issue with this cavalier dismissal by the court of the attempts of local school boards to maintain suitable standards of conduct. Indeed, it is insulting to non-white parents at all economic levels to infer that they are not equally concerned that standards of decency and decorum be maintained in the schools.

Unlike the lower court below, Amicus is not puzzled at all by Petitioners citation of Island Trees in support of its position that school boards may regulate "vulgar" speech (even though the speech might not be "obscene" in an adult setting). Although that case does not answer definitively the question of whether school boards may remove books from the library based on their

"political" content, it does speak definitively on the right of boards to censor "vulgar" materials - even from the library.

The Justices were unanimous that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." 10 S.Ct. 2799, 2806. (But four of those justices were not willing to extend that principle to include the right to remove books from the library because of their "political" content.)

As noted above, the instant case does not involve political speech, so the line drawn by four of the plurality in Island Trees is not relevant here. The case was remanded for a finding as to whether "the removal decision was based upon

constitutionally valid concerns" such as that the board believed the books to be "vulgar." The language of both the plurality opinion and Justice White's concurrence with the judgment implies that the Court would not interfere with a decision by the school board to remove library books which are deemed by the board to be "vulgar," regardless of whether the books would be held to be "obscene" under traditional first amendment standards for adult materials.

**V. SCHOOL RULE PROHIBITING "OBSCENITY"
IS NOT UNCONSTITUTIONALLY VAGUE**

In a statement which appears to be somewhat of an afterthought, the court of appeals upheld the district court's decision that the Petitioners' disruptive conduct rule is unconstitutionally vague, uncertain, and indefinite under the

fourteenth amendment's due process clause. If that is so, then it is unlikely that any school code of conduct in the country would pass constitutional muster.

It would appear that the lower courts found the rule unconstitutional not because of its vagueness but because they disagreed with the school district's interpretation and application of the rule. The Supreme Court has ruled that, in absence of a clear constitutional violation, boards should be left to their own interpretation.

In Board of Education of Rogers, Ark. v. McCluskey, the Eighth Circuit Court of Appeals had ruled that a school board had "unreasonably" construed its regulation by extending its prohibition against the possession of "intoxicating liquors" to include 3.2% malt liquor (which is not

"intoxicating liquor" under the state statute). The Supreme Court reversed, per curiam, holding that, although a school board's interpretation of its rules may be so extreme as to be a violation of due process, that was not the case in this instance. The Court stated: "We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of section 11 with their own notions under the facts of the case." 458 U.S. 966, 102 S.Ct. 3469, 3472 (1982).

Likewise, the courts below in this instance were not satisfied with the school district's interpretation of its rule prohibiting "obscenity" and, thus declared it unconstitutionally vague.

CONCLUSION

The court of appeals opinion seems to

emphasize certain factors in this case which are legally irrelevant, such as the fact that the student was an honor student, a recipient of awards for speaking, and the choice of the student body for the honor of speaking at the graduation ceremonies. One wonders if this case would be in the High Court had the student been a C student with a less refined gift for rhetoric.

District Judge Tanner even noted his "repugnance" in having to be involved in this situation. Indeed he should not have been involved. This is a situation which cries for a quiet solution by the officials of the school, the student and the student's parents. Perhaps a solution might have been reached, had the impending graduation not necessitated a hasty solution.

Nevertheless, the first amendment should not be trivialized as it was here, merely to accommodate the personal feelings of federal judges who disagree with the severity of the punishment inflicted on a student. The fact that a court believes that the punishment was too severe and perhaps another solution could have been reached does not give the court the authority to substitute its judgment for that of the school board and the school officials.

The school district had both the right and the duty to establish a code of conduct for the student body and the right and the duty to administer it in a fair manner. There is no assertion here that Fraser was not treated fairly. He had prior notice of the school's rules of conduct. He was notified of the charges

against him and given an opportunity to respond. During his session with the assistant principal he admitted the offense. He then received the opportunity to appeal to an administrative hearing officer, who affirmed the decision. No more than that is required under the U.S. Constitution.

Respectfully submitted,

Gwendolyn H. Gregory
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate Executive Director
and General Counsel

THOMAS A. SHANNON
NSBA Executive Director

9
NO. 84-1667

Supreme Court, U.S.

FILED

DEC 2 1985

JOSEPH F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

BETHEL SCHOOL DISTRICT NO. 403, ET AL.,
Petitioners,
V.

MATTHEW N. FRASER, A MINOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE,
TEXAS COUNCIL OF SCHOOL ATTORNEYS

CORRECTED COPY

JEAN F. POWERS
Visiting Ass't Professor of Law
c/o The Legal Foundation of
America
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

DAVID CRUMP
Professor of Law
South Texas College of Law

BEST AVAILABLE COPY

1616

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT AND AUTHORITIES	2
I. THE DECISION BELOW FAILS TO GRANT ANY RECOGNITION TO FIRST AMENDMENT RIGHTS OF STUDENTS IN A CAPTIVE AUDIENCE, OF SCHOOL ADMINISTRATORS, OF PARENTS WHO DESIRE TO INFLUENCE THE MORAL UPBRING- ING OF THEIR CHILDREN, OR OF PERSONS IN THE ELECTORATE WHO WISH TO AVOID SPONSORING INAPPROPRIATE UTTERANCES	2
A. <i>A Captive Audience Has a Right Not to Be Subjected to Utterances or Activity That It Should Be Able to Choose Not to Hear, and This Right is Protected By the First Amend- ment</i>	3
B. <i>Parents, Administrators, and Others Have a First Amendment Right to Avoid Sponsoring Activity That Interferes With the Important Educational Function of Preserving the Moral Values of the Society, a Right Repeatedly Recognized by This Court</i>	4
C. <i>The Result of the Decision Below Will Be to Limit the Opportunities of All Other Students</i>	

*For Expression in Similar Assemblies, Because
Parents Rightly Will Not Tolerate a Situation
In Which Administrators Must Sponsor In-
decent Utterances to Captive Audiences of
Students*

6

**II. THE DECISION BELOW FAILS TO AFFORD PRO-
PER DEFERENCE TO THE AUTHORITY AND
EXPERTISE OF SCHOOL ADMINISTRATORS,
WHO NECESSARILY MUST DECIDE, ON A
DAILY BASIS, WHAT THE GROUND RULES
MUST BE FOR ACTIVITIES BOTH RELATED
TO SPEECH AND UNRELATED TO IT**

6

*A. The Public School Setting is a Special Setting,
In Which Indecent Activity or Speech Must
Be Treated Differently Than in Society at
Large*

7

*B. In a Public School, Teachers and Administra-
tors Should Have Room to Consider the
Purpose of Speech-Related Activity, as Well
as the Time, Place, and Manner in Which It
Occurs*

10

*C. The Effect of This Decision Will Be to Under-
mine Public Confidence in the Public Schools*

10

CONCLUSION

11

TABLE OF AUTHORITIES

CASES

Ambach v. Norwich, 441 U.S. 68 (1979)	5
Board of Education v. Pico, 457 U.S. 853 (1982)	5
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	7
Connick v. Meyers, 461 U.S. 138 (1983)	10
Erzoznik v. Jacksonville, 422 U.S. 205 (1975)	4
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	3, 10
Ginsberg v. New York, 390 U.S. 629 (1968) (<i>citing</i> Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1962))	8
Lehman v. Shaker Heights, 418 U.S. 298 (1974)	4
Papish v. Board of Curators, 410 U.S. 667 (1973)	10
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	4
Redrup v. New York, 386 U.S. 767 (1967)	4
Rowan v. United States Post Office Department, 307 U.S. 728 (1970)	3
Tinker v. Des Moines Independent Community School District, 303 U.S. 503 (1969)	3, 7
Wooley v. Maynard, 430 U.S. 705 (1977)	4, 5

SECONDARY AUTHORITIES

Diamond, <i>The First Amendment and Public Schools: The Case Against Judicial Intervention</i> , 59 TEX. L. REV. 447 (1981) (<i>quoting</i> I. B. Berkson, <i>The</i> <i>Ideal and the Community</i> 285 (1958))	5, 9
Haskell, <i>Student Expression in the Public Schools: Tinker Distinguished</i> , 59 GEO. L. J. 37 (1970)	9



NO. 84-1667

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BETHEL SCHOOL DISTRICT NO. 403, ET AL.,
Petitioners,
V.

MATTHEW N. FRASER, A MINOR, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE,
TEXAS COUNCIL OF SCHOOL ATTORNEYS

INTEREST OF AMICUS CURIAE

The Texas Council of School Attorneys is a nonprofit association of attorneys and counselors for school districts throughout the State of Texas. Its interest in the present case lies in its members' duty to give advice on legal matters to these school districts, which attempt to comply with the law while making sound educational decisions. Amicus curiae is concerned that the law may not provide room for sound educational policy if the decision below is not reversed. Because of their experience in regularly representing school districts, the members of amicus curiae may be in a position to assist the Court in developing the issues more fully.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case made by Petitioners.

SUMMARY OF ARGUMENT

The decision below fails to protect the first amendment right of the students in a captive audience not to listen to offensive utterances. It further fails to recognize the right of parents to ensure that their children are receiving "appropriate training" in the schools, and the right of school administrators not to be forced to sponsor and condone activity that is contrary to the moral values of the community to which they are responsible. The inevitable effect of the decision below will be contrary to first amendment values because it will make teachers hesitant to hold similar assemblies in the public schools.

The decision below fails to give due deference to the expertise and authority of the school administrators to make decisions affecting the students, taking into consideration the makeup of the student body, particularly the age of the students, and the effect given behavior is likely to have on the learning environment of the school, on discipline, and on the self-esteem of female students. If the school is prevented from responding to these concerns, the result will be less community control and reduced public confidence in the public schools.

ARGUMENT AND AUTHORITIES

- I. THE DECISION BELOW FAILS TO GRANT ANY RECOGNITION TO FIRST AMENDMENT RIGHTS OF STUDENTS IN A CAPTIVE AUDIENCE, OF SCHOOL ADMINISTRATORS, OF PARENTS WHO DESIRE TO INFLUENCE THE MORAL UPBRINGING OF THEIR CHILDREN, OR OF PERSONS IN

THE ELECTORATE WHO WISH TO AVOID
SPONSORING INAPPROPRIATE UTTER-
ANCES.

- A. *A captive audience has a right not to be subjected to utterances or activity that it should be able to choose not to hear, and this right is protected by the first amendment.*

The right to speak includes the right not to listen.¹ In particular, it includes the right of a captive audience² to avoid being subjected to obscene, indecent or otherwise inappropriate utterances forced upon members of that audience. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), citing *Rowan v. United States Post Office Department*, 307 U.S. 728 (1970). The rights of the

1 This Court stated in *Tinker v. Des Moines Independent Community School District*, 303 U.S. 503, 513 (1969), that

conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

2 That the students were a captive audience even though the assembly was “voluntary” is clear when one considers that the only option they had was to attend study hall. Further, they would not normally expect to hear such speech at the assembly, and once it has been heard, the right of the student to walk out (if it is even reasonable to expect that a high school student would choose this option in front of his peers) clearly does not protect his right to not be subjected to the speech. As this Court stated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in rejecting the argument that the ability to turn off the radio was sufficient protection against being subjected to indecent language on the radio,

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49.

listener are paramount when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975); see also *Redrup v. New York*, 386 U.S. 767, 768 (1967).

The rights of the captive audience in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), resulted in a decision that a city had a right to refuse a political candidate's advertising on its bus system. The Court determined that the "nature of the forum and the conflicting interests involved," precluded the holding that the candidate had a first amendment right to place the advertisement, because the interests of the captive audience in not listening to what they did not want to receive were the significant constitutionally protected interests. The present case involves more offensive utterances, an audience that is physically captive, and a stronger argument for the first amendment right not to be subjected unwillingly to such utterances, than in *Lehman*.

B. *Parents, administrators, and others have a first amendment right to avoid sponsoring activity that interferes with the important educational function of preserving the moral values of the society, a right repeatedly recognized by this court.*

The decision below prevents parents from exercising the right to ensure the "appropriate training" of their children. This right has a first amendment basis. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925). Even if they did not have such a right, they have the right to avoid association with, and to "refuse to foster," utterances that they find "morally objectionable." *Wooley v. Maynard*, 430 U.S. 705 (1977). The decision below gives no recognition to the very real first amendment rights of parents to send their children to a school at which they are not forcibly subjected to offensive, obscene or immoral utterances that are promulgated in the name of the school or its sponsorship. The decision below, which recognizes no limits to the power to utter such material to an audience that must be present in school, would prevent parents from exercising that first amendment right.

Additionally, the decision below puts school administrators in the position of having to sponsor, whether their educational judgments would allow it or not, utterances that are contrary to the moral values held by many in the community. This forced sponsorship is especially repugnant given this Court's repeated statements that one of the major functions of the public schools is to preserve the moral values of the society. *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (school administrators' judgments must prevail unless they attempt forcibly to promulgate a single "orthodoxy" in thought, which administrators here were clearly not attempting to do); *Ambach v. Norwich*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized.")

The decision below forces administrators, in discharging this important educational function,³ to associate themselves with the sponsorship of utterances that they should be free to "refuse to foster" because they and parents of children, to whom they are responsible, find them "morally objectionable" and hence inconsistent with this important educational purpose. *Wooley*, *supra*. The decision below gives neither recognition nor

3 [O]ne of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society. Sociologists generally accept the necessity of society's transmitting its cultural and moral values to the next generation through a process of socialization; in the United States this socialization process occurs not only in the family, but also in the public educational system. Thus, "education involves inducting the individual into the communities on which he depends for his material welfare, his cultural development, and his spiritual growth . . . It includes . . . 'the acquisition of the arts, the sciences, and the moral attitudes of civilization.' "

Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 498 (1981) (quoting I. B. Berkson, *The Ideal and the Community* 285 (1958)) (other footnotes omitted).

protection to these important first amendment interests. In particular, the implication of the court below that it is inappropriate for the schools to recognize such rights as these because they represent "middle class standards" displays a lack of awareness of the function of the schools in this important area.

- C. *The result of the decision below will be to limit the opportunities of all other students for expression in similar assemblies, because parents rightly will not tolerate a situation in which administrators must sponsor indecent utterances to captive audiences of students.*

The school is certainly not required to offer the students the opportunity to conduct an assembly such as the one involved here. If in conducting the assembly, it is forced into a position which will lower its esteem with the community, subject it to the criticism and protests of parents, and undermine its effectiveness in educating and disciplining students, the obvious solution is simply not to conduct the assembly. In fact, if it is prevented from reasonably supervising the assembly, discontinuation may be the only solution. This solution would deprive the rest of the student body of an important educational and communicative opportunity, with no compensating gain.

In providing for this school assembly, the school has expended time and resources that could have been used in other more intellectual pursuits. Apparently the school administration felt that there was educational value in holding such an assembly, such as giving some students an opportunity to participate in public speaking, allowing all students to participate in some manner, as candidates, workers, or voters, in a political process, and encouraging responsible decision-making. Yet this learning experience is not the only one taking place in the school, and is not even the primary one. If the school is to continue to offer such an opportunity, it must be able to keep it in its proper perspective.

II. THE DECISION BELOW FAILS TO AFFORD PROPER DEFERENCE TO THE AUTHOR.

ITY AND EXPERTISE OF SCHOOL ADMINISTRATORS, WHO NECESSARILY MUST DECIDE, ON A DAILY BASIS, WHAT THE GROUND RULES MUST BE FOR ACTIVITIES BOTH RELATED TO SPEECH AND UNRELATED TO IT.

- A. *The public school setting is a special setting, in which indecent activity or speech must be treated differently than in society at large.*

This Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct⁴ in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969) (footnote added). It must be remembered that the public schools serve all students in the community. Gifted students, handicapped students, autistic children, mentally retarded children, and a wide variety of others are within the care of administrators of the schools acting in varied degrees of *in loco parentis*. The schools include high schools with achievement oriented children and elementary children as young as three, who are from both high achievement and deprived backgrounds.

The State has greater ability to protect children from exposure to inappropriate utterances than adults, even in the larger

4 Matt Fraser's method of expression is more like conduct than speech, not only in its effect on other students, but also in the fact that the sexual innuendo is "no essential part of any exposition of ideas," and of "such slight social value as a step to truth that any benefit . . . is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This Court noted that the passive expression of opinion in *Tinker*, on the other hand, although involving conduct rather than words, was more like "pure speech" than conduct, because of its strong communicative content, *Tinker*, *supra* at 505, 508, and therefore afforded it greater protection than is warranted under the facts herein.

society outside school. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (citing *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1962)), pointing out that it was at least rational to limit the availability of offensive materials to minors under seventeen. *Ginsberg*, *supra* at 639. In a four-year high school many of the students would be much younger than seventeen, and the fact that they have been included in public secondary education indicates a judgment by society that this is an impressionable and important time for learning not only academics, but the values of society.

It is not necessary that the behavior be as disruptive as would be required in a non-school setting for the school to be allowed to regulate it.⁵ What is disruptive of the learning process is more for the educational experts than for the courts to determine. The disruption could consist of a mental preoccupation as well as a physical disturbance. The proper role of the school and the judiciary has been described as follows:

The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fistfights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. In the street corner context, the court can say that

5 The Ninth Circuit further suggests that the appropriateness of Respondent's speech "is for his fellow students to judge when they cast their ballots in the school election." *Fraser*, *supra* at 1363. Yet this too ignores the role of the school. The question here is not student approval, but the right and ability of the school to seek a higher standard of behavior from students. It is not unusual for disrespectful behavior to meet with student approval, but that does not necessarily mean it is to be encouraged. If the students are to set the standards for conduct, are they likewise to plan the school menus, design the curriculum, and determine how much homework is to be assigned?

distraction does not matter and can measure the functioning of the institution by whether people can use the streets. The lack of knowledge about what really enables people to learn and about the complex interrelationships of the variables involved prevent courts from judging that no interference has taken place in the school. Here, courts should defer to the good faith judgment of the expert authorities.

Diamond, *supra* at 497-98.

A major concern in the school setting is the effect such a speech may have on discipline generally, not simply on the immediate situation. See Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L. J. 37, 50 (1970). Sexually suggestive language used blatantly in the presence of authority figures who are sure to not approve carries with it an unmistakable message of insubordination. In fact, Respondent has admitted as much in stating in his brief that he "wished to demonstrate . . . that . . . he had the . . . guts to stand up before the administration and deliver a speech which . . . the administration would find inappropriate." *Response to Petition for Certiorari* at 16. There is a danger to the entire learning process if this motive overcomes educational purposes. In fact, a fair reading of the Ninth Circuit's opinion would indicate that a student could openly insult a teacher in the classroom, and, if the class refrained from disruptive reaction, the teacher would not be able to impose discipline without violating the student's first amendment rights.

The impact of these utterances on the audience is another aspect that should be left to educators. At trial, an educational expert testified that this speech was "sexually harrassing to female students" and therefore "disruptive to the learning process." J. App. 79 & 72-81. This verbal sexual assault is demeaning to such students and lowers their self-esteem and ability to function equally with male students, in the same way that a racial or ethnic slur would. The extent of the harm can be appreciated by imagining the next person to address the captive audience, who might be a female student sponsoring a female

candidate for president; this student cannot and should not be forced to compete by similar kinds of offensive rape metaphors. The opinion below disallows any rational exercise of important educational administrative judgment in this regard.

- B. *In a public school, teachers and administrators should have room to consider the purpose of speech-related activity, as well as the time, place, and manner in which it occurs.*

In *Connick v. Meyers*, 461 U.S. 138 (1983), this Court had occasion to consider utterances that were subject to administrative balancing concerns in another context. The distinction drawn in *Connick* was between discussion of public issues and utterances furthering purely private concerns of the person issuing them. An analogous principle is applicable here. The remarks in question were not intended to advance discussion of real public issues; instead, they were designed to insult persons responsible for maintaining decorum, designate the speaker as a big wheel, and show, in Respondent's own words, that he had "guts." These private purposes, as in *Connick v. Meyers*, justify greater deference to administrative concerns to protect other persons' rights.

Furthermore, schoolteachers and administrators clearly have the authority to consider the "time, place and manner" in which speech-related activity is conducted. *Papish v. Board of Curators*, 410 U.S. 667 (1973); *FCC v. Pacifica Foundation*, *supra*. If the utterances in question had occurred on the school yard or parking lot with only twenty acquaintances of the speaker present, they would have been dramatically different from the officially sanctioned assembly held before a captive audience in this case.

- C. *The effect of this decision will be to undermine public confidence in the public schools.*

One of the major strengths of the educational system in this country has been the support and involvement of the local community. Yet the decision below impedes the ability of the community to control its schools, and to influence the quality

of the overall education of its children. The dissatisfaction and loss of confidence in the schools which necessarily follows for many parents tends to cause those with the opportunity and financial ability to send their children to private schools where their children can be educated in a manner more acceptable to them. However, if the decision below is allowed to stand, those without the wherewithal to choose this option must stay with the public schools and see decisions that are rightfully theirs being made by the judiciary instead.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Jean F. Powers
Visiting Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

David Crump
Professor of Law
South Texas College of Law

8

Supreme Court, U.S.

FILED

DEC 2 1985

NO. 84-1667

JOSEPH E. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

BETHEL SCHOOL DISTRICT NO. 403, ET AL.,
Petitioners,
V.

MATTHEW N. FRASER, A MINOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF AMICUS CURIAE,
TEXAS COUNCIL OF SCHOOL ATTORNEYS**

JEAN F. POWERS
Visiting Ass't Professor of Law
c/o The Legal Foundation of
America
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

DAVID CRUMP
Professor of Law
South Texas College of Law

BEST AVAILABLE COPY

16

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT AND AUTHORITIES	2
I. THE DECISION BELOW FAILS TO GRANT ANY RECOGNITION TO FIRST AMENDMENT RIGHTS OF STUDENTS IN A CAPTIVE AUDIENCE, OF SCHOOL ADMINISTRATORS, OF PARENTS WHO DESIRE TO INFLUENCE THE MORAL UPBRING- ING OF THEIR CHILDREN, OR OF PERSONS IN THE ELECTORATE WHO WISH TO AVOID SPONSORING INAPPROPRIATE UTTERANCES	2
A. <i>A Captive Audience Has a Right Not to Be Subjected to Utterances or Activity That It Should Be Able to Choose Not to Hear, and This Right is Protected By the First Amend- ment</i>	3
B. <i>Parents, Administrators, and Others Have a First Amendment Right to Avoid Sponsoring Activity That Interferes With the Important Educational Function of Preserving the Moral Values of the Society, a Right Repeatedly Recognized by This Court</i>	4
C. <i>The Result of the Decision Below Will Be to Limit the Opportunities of All Other Students</i>	

*For Expression in Similar Assemblies, Because
Parents Rightly Will Not Tolerate a Situation
In Which Administrators Must Sponsor In-
decent Utterances to Captive Audiences of
Students*

6

**II. THE DECISION BELOW FAILS TO AFFORD PRO-
PER DEFERENCE TO THE AUTHORITY AND
EXPERTISE OF SCHOOL ADMINISTRATORS,
WHO NECESSARILY MUST DECIDE, ON A
DAILY BASIS, WHAT THE GROUND RULES
MUST BE FOR ACTIVITIES BOTH RELATED
TO SPEECH AND UNRELATED TO IT**

6

*A. The Public School Setting is a Special Setting,
In Which Indecent Activity or Speech Must
Be Treated Differently Than in Society at
Large*

7

*B. In a Public School, Teachers and Administra-
tors Should Have Room to Consider the
Purpose of Speech-Related Activity, as Well
as the Time, Place, and Manner in Which It
Occurs*

10

*C. The Effect of This Decision Will Be to Under-
mine Public Confidence in the Public Schools*

10

CONCLUSION

11

TABLE OF AUTHORITIES

CASES

Ambach v. Norwich, 441 U.S. 68 (1979)	5
Board of Education v. Pico, 457 U.S. 853 (1982)	5
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	7
Connick v. Meyers, 461 U.S. 138 (1983)	10
Erzoznik v. Jacksonville, 422 U.S. 205 (1975)	4
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	3, 10
Ginsberg v. New York, 390 U.S. 629 (1968) (<i>citing</i> Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1962))	8
Lehman v. Shaker Heights, 418 U.S. 298 (1974)	4
Papish v. Board of Curators, 410 U.S. 667 (1973)	10
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	4
Redrup v. New York, 386 U.S. 767 (1967)	4
Rowan v. United States Post Office Department, 307 U.S. 728 (1970)	3
Tinker v. Des Moines Independent Community School District, 303 U.S. 503 (1969)	3, 7
Wooley v. Maynard, 430 U.S. 705 (1977)	4, 5

SECONDARY AUTHORITIES

Diamond, <i>The First Amendment and Public Schools: The Case Against Judicial Intervention</i> , 59 TEX. L. REV. 447 (1981) (<i>quoting</i> I. B. Berkson, <i>The Ideal and the Community</i> 285 (1958))	5, 9
Haskell, <i>Student Expression in the Public Schools: Tinker Distinguished</i> , 59 GEO. L. J. 37 (1970)	9

NO. 84-1667

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

BETHEL SCHOOL DISTRICT NO. 403, ET AL.,
Petitioners,
V.

MATTHEW N. FRASER, A MINOR, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE,
TEXAS COUNCIL OF SCHOOL ATTORNEYS

INTEREST OF AMICUS CURIAE

The Texas Council of School Attorneys is a nonprofit association of attorneys and counselors for school districts throughout the State of Texas. Its interest in the present case lies in its members' duty to give advice on legal matters to these school districts, which attempt to comply with the law while making sound educational decisions. Amicus curiae is concerned that the law may not provide room for sound educational policy if the decision below is not reversed. Because of their experience in regularly representing school districts, the members of amicus curiae may be in a position to assist the Court in developing the issues more fully.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case made by Petitioners.

SUMMARY OF ARGUMENT

The decision below fails to protect the first amendment right of the students in a captive audience not to listen to offensive utterances. It further fails to recognize the right of parents to ensure that their children are receiving "appropriate training" in the schools, and the right of school administrators not to be forced to sponsor and condone activity that is contrary to the moral values of the community to which they are responsible. The inevitable effect of the decision below will be contrary to first amendment values because it will make teachers hesitant to hold similar assemblies in the public schools.

The decision below fails to give due deference to the expertise and authority of the school administrators to make decisions affecting the students, taking into consideration the makeup of the student body, particularly the age of the students, and the effect given behavior is likely to have on the learning environment of the school, on discipline, and on the self-esteem of female students. If the school is prevented from responding to these concerns, the result will be less community control and reduced public confidence in the public schools.

ARGUMENT AND AUTHORITIES

- I. THE DECISION BELOW FAILS TO GRANT ANY RECOGNITION TO FIRST AMENDMENT RIGHTS OF STUDENTS IN A CAPTIVE AUDIENCE, OF SCHOOL ADMINISTRATORS, OF PARENTS WHO DESIRE TO INFLUENCE THE MORAL UPBRINGING OF THEIR CHILDREN, OR OF PERSONS IN

THE ELECTORATE WHO WISH TO AVOID SPONSORING INAPPROPRIATE UTTER- ANCES.

- A. *A captive audience has a right not to be subjected to utterances or activity that it should be able to choose not to hear, and this right is protected by the first amendment.*

The right to speak includes the right not to listen.¹ In particular, it includes the right of a captive audience² to avoid being subjected to obscene, indecent or otherwise inappropriate utterances forced upon members of that audience. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), citing *Rowan v. United States Post Office Department*, 307 U.S. 728 (1970). The rights of the

1 This Court stated in *Tinker v. Des Moines Independent Community School District*, 303 U.S. 503, 513 (1969), that

conduct by the student, in class or out of it, which for any reason—whether it seems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

2 That the students were a captive audience even the assembly was “voluntary” is clear when one considers that the only option they had was to attend study hall, that they would normally expect to hear such speech at the assembly, and once it has been heard, the right of the student to walk out (if it is even reasonable to expect that a high school student would choose this option in front of his peers) clearly does not protect his right to not be subjected to the speech. As this Court stated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in rejecting the argument that the ability to turn off the radio was sufficient protection against being subjected to indecent language on the radio,

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49.

listener are paramount when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975); see also *Redrup v. New York*, 386 U.S. 767, 768 (1967).

The rights of the captive audience in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), resulted in a decision that a city had a right to refuse a political candidate's advertising on its bus system. The Court determined that the "nature of the forum and the conflicting interests involved," precluded the holding that the candidate had a first amendment right to place the advertisement, because the interests of the captive audience in not listening to what they did not want to receive were the significant constitutionally protected interests. The present case involves more offensive utterances, an audience that is physically captive, and a stronger argument for the first amendment right not to be subjected unwillingly to such utterances, than in *Lehman*.

B. *Parents, administrators, and others have a first amendment right to avoid sponsoring activity that interferes with the important educational function of preserving the moral values of the society, a right repeatedly recognized by this court.*

The decision below prevents parents from exercising the right to ensure the "appropriate training" of their children. This right has a first amendment basis. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925). Even if they did not have such a right, they have the right to avoid association with, and to "refuse to foster," utterances that they find "morally objectionable." *Wooley v. Maynard*, 430 U.S. 705 (1977). The decision below gives no recognition to the very real first amendment rights of parents to send their children to a school at which they are not forcibly subjected to offensive, obscene or immoral utterances that are promulgated in the name of the school or its sponsorship. The decision below, which recognizes no limits to the power to utter such material to an audience that must be present in school, would prevent parents from exercising that first amendment right.

Additionally, the decision below puts school administrators in the position of having to sponsor, whether their educational judgments would allow it or not, utterances that are contrary to the moral values held by many in the community. This forced sponsorship is especially repugnant given this Court's repeated statements that one of the major functions of the public schools is to preserve the moral values of the society. *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (school administrators' judgments must prevail unless they attempt forcibly to promulgate a single "orthodoxy" in thought, which administrators here were clearly not attempting to do); *Ambach v. Norwich*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized.")

The decision below forces administrators, in discharging this important educational function,³ to associate themselves with the sponsorship of utterances that they should be free to "refuse to foster" because they and parents of children, to whom they are responsible, find them "morally objectionable" and hence inconsistent with this important educational purpose. *Wooley*, *supra*. The decision below gives neither recognition nor

3 [O]ne of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society. Sociologists generally accept the necessity of society's transmitting its cultural and moral values to the next generation through a process of socialization; in the United States this socialization process occurs not only in the family, but also in the public educational system. Thus, "education involves inducting the individual into the communities on which he depends for his material welfare, his cultural development, and his spiritual growth . . . It includes . . . 'the acquisition of the arts, the sciences, and the moral attitudes of civilization.' "

Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 498 (1981) (quoting I. B. Berkson, *The Ideal and the Community* 285 (1958)) (other footnotes omitted).

protection to these important first amendment interests. In particular, the implication of the court below that it is inappropriate for the schools to recognize such rights as these because they represent "middle class standards" displays a lack of awareness of the function of the schools in this important area.

- C. *The result of the decision below will be to limit the opportunities of all other students for expression in similar assemblies, because parents rightly will not tolerate a situation in which administrators must sponsor indecent utterances to captive audiences of students.*

The school is certainly not required to offer the students the opportunity to conduct an assembly such as the one involved here. If in conducting the assembly, it is forced into a position which will lower its esteem with the community, subject it to the criticism and protests of parents, and undermine its effectiveness in educating and disciplining students, the obvious solution is simply not to conduct the assembly. In fact, if it is prevented from reasonably supervising the assembly, discontinuation may be the only solution. This solution would deprive the rest of the student body of an important educational and communicative opportunity, with no compensating gain.

In providing for this school assembly, the school has expended time and resources that could have been used in other more intellectual pursuits. Apparently the school administration felt that there was educational value in holding such an assembly, such as giving some students an opportunity to participate in public speaking, allowing all students to participate in some manner, as candidates, workers, or voters, in a political process, and encouraging responsible decision-making. Yet this learning experience is not the only one taking place in the school, and is not even the primary one. If the school is to continue to offer such an opportunity, it must be able to keep it in its proper perspective.

II. THE DECISION BELOW FAILS TO AFFORD PROPER DEFERENCE TO THE AUTHOR-

ITY AND EXPERTISE OF SCHOOL ADMINISTRATORS, WHO NECESSARILY MUST DECIDE, ON A DAILY BASIS, WHAT THE GROUND RULES MUST BE FOR ACTIVITIES BOTH RELATED TO SPEECH AND UNRELATED TO IT.

- A. *The public school setting is a special setting, in which indecent activity or speech must be treated differently than in society at large.*

This Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct⁴ in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969) (footnote added). It must be remembered that the public schools serve all students in the community. Gifted students, handicapped students, autistic children, mentally retarded children, and a wide variety of others are within the care of administrators of the schools acting in varied degrees of *in loco parentis*. The schools include high schools with achievement oriented children and elementary children as young as three, who are from both high achievement and deprived backgrounds.

The State has greater ability to protect children from exposure to inappropriate utterances than adults, even in the larger

4 Matt Fraser's method of expression is more like conduct than speech, not only in its effect on other students, but also in the fact that the sexual innuendo is "no essential part of any exposition of ideas," and of "such slight social value as a step to truth that any benefit . . . is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This Court noted that the passive expression of opinion in *Tinker*, on the other hand, although involving conduct rather than words, was more like "pure speech" than conduct, because of its strong communicative content, *Tinker*, *supra* at 505, 508, and therefore afforded it greater protection than is warranted under the facts herein.

society outside school. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (citing *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1962)), pointing out that it was at least rational to limit the availability of offensive materials to minors under seventeen. *Ginsberg, supra* at 639. In a four-year high school many of the students would be much younger than seventeen, and the fact that they have been included in public secondary education indicates a judgment by society that this is an impressionable and important time for learning not only academics, but the values of society.

It is not necessary that the behavior be as disruptive as would be required in a non-school setting for the school to be allowed to regulate it.⁵ What is disruptive of the learning process is more for the educational experts than for the courts to determine. The disruption could consist of a mental preoccupation as well as a physical disturbance. The proper role of the school and the judiciary has been described as follows:

The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fistfights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. In the street corner context, the court can say that

5 The Ninth Circuit further suggests that the appropriateness of Respondent's speech "is for his fellow students to judge when they cast their ballots in the school election." *Fraser, supra* at 1363. Yet this too ignores the role of the school. The question here is not student approval, but the right and ability of the school to seek a higher standard of behavior from students. It is not unusual for disrespectful behavior to meet with student approval, but that does not necessarily mean it is to be encouraged. If the students are to set the standards for conduct, are they likewise to plan the school menus, design the curriculum, and determine how much homework is to be assigned?

distraction does not matter and can measure the functioning of the institution by whether people can use the streets. The lack of knowledge about what really enables people to learn and about the complex interrelationships of the variables involved prevent courts from judging that no interference has taken place in the school. Here, courts should defer to the good faith judgment of the expert authorities.

Diamond, *supra* at 497-98.

A major concern in the school setting is the effect such a speech may have on discipline generally, not simply on the immediate situation. See Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L. J. 37, 50 (1970). Sexually suggestive language used blatantly in the presence of authority figures who are sure to not approve carries with it an unmistakable message of insubordination. In fact, Respondent has admitted as much in stating in his brief that he "wished to demonstrate . . . that . . . he had the . . . guts to stand up before the administration and deliver a speech which . . . the administration would find inappropriate." *Response to Petition for Certiorari* at 16. There is a danger to the entire learning process if this motive overcomes educational purposes. In fact, a fair reading of the Ninth Circuit's opinion would indicate that a student could openly insult a teacher in the classroom, and, if the class refrained from disruptive reaction, the teacher would not be able to impose discipline without violating the student's first amendment rights.

The impact of these utterances on the audience is another aspect that should be left to educators. At trial, an educational expert testified that this speech was "sexually harrassing to female students" and therefore "disruptive to the learning process." J. App. 79 & 72-81. This verbal sexual assault is demeaning to such students and lowers their self-esteem and ability to function equally with male students, in the same way that a racial or ethnic slur would. The extent of the harm can be appreciated by imagining the next person to address the captive audience, who might be a female student sponsoring a female

candidate for president; this student cannot and should not be forced to compete by similar kinds of offensive rape metaphors. The opinion below disallows any rational exercise of important educational administrative judgment in this regard.

B. In a public school, teachers and administrators should have room to consider the purpose of speech-related activity, as well as the time, place, and manner in which it occurs.

In *Connick v. Meyers*, 461 U.S. 138 (1983), this Court had occasion to consider utterances that were subject to administrative balancing concerns in another context. The distinction drawn in *Connick* was between discussion of public issues and utterances furthering purely private concerns of the person issuing them. An analogous principle is applicable here. The remarks in question were not intended to advance discussion of real public issues; instead, they were designed to insult persons responsible for maintaining decorum, designate the speaker as a big wheel, and show, in Respondent's own words, that he had "guts." These private purposes, as in *Connick v. Meyers*, justify greater deference to administrative concerns to protect other persons' rights.

Furthermore, schoolteachers and administrators clearly have the authority to consider the "time, place and manner" in which speech-related activity is conducted. *Papish v. Board of Curators*, 410 U.S. 667 (1973); *FCC v. Pacifica Foundation*, *supra*. If the utterances in question had occurred on the school yard or parking lot with only twenty acquaintances of the speaker present, they would have been dramatically different from the officially sanctioned assembly held before a captive audience in this case.

C. The effect of this decision will be to undermine public confidence in the public schools.

One of the major strengths of the educational system in this country has been the support and involvement of the local community. Yet the decision below impedes the ability of the community to control its schools, and to influence the quality

of the overall education of its children. The dissatisfaction and loss of confidence in the schools which necessarily follows for many parents tends to cause those with the opportunity and financial ability to send their children to private schools where their children can be educated in a manner more acceptable to them. However, if the decision below is allowed to stand, those without the wherewithal to choose this option must stay with the public schools and see decisions that are rightfully theirs being made by the judiciary instead.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

Jean F. Powers
Visiting Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

David Crump
Professor of Law
South Texas College of Law

7

No. 84-1667

Supreme Court, U.S.

FILED

DEC 8 1985

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, ET AL., PETITIONERS

v.

MATTHEW N. FRASER, A MINOR, AND E.L. FRASER,
GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED

Solicitor General

RICHARD K. WILLARD

Assistant Attorney General

CAROLYN B. KUHLM

Deputy Solicitor General

CHRISTOPHER J. WRIGHT

Assistant to the Solicitor General

ANTHONY J. STEINMEYER

ROBERT V. ZENER

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

EST AVAILABLE COPY

35

QUESTION PRESENTED

Whether school officials violated a student's First Amendment rights by disciplining him for delivering an indecent speech at a school assembly, in the absence of a showing that the speech caused a substantial physical disruption.



TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
School officials acted reasonably in suspending respondent	9
A. This Court's decisions do not hold that school officials may only proscribe speech that causes physical disruption or is legally obscene	9
B. The special role of public schools, which this Court has recognized, shows that school officials may prohibit indecent speech because they are charged with inculcating basic values	13
C. High school officials may regulate students' speech if they do not suppress expression of a particular viewpoint	18
D. The conception of free speech urged here is con- sistent with the government's position in <i>Bender</i> <i>v. Williamsport Area School District</i>	22
E. The school district reasonably enforced its rule in this case	23
Conclusion	28

TABLE OF AUTHORITIES

Cases:

<i>Ambach v. Norwick</i> , 441 U.S. 68	15
<i>Bellotti v. Baird</i> , 443 U.S. 622	16
<i>Board of Education v. McCluskey</i> , 458 U.S. 966.....	23
<i>Board of Education v. Pico</i> , 457 U.S. 853.....	9, 16, 17, 24-25
<i>Brown v. Board of Education</i> , 347 U.S. 483	15
<i>Bundy v. Jackson</i> , 641 F.2d 934	19
<i>Burnside v. Byars</i> , 363 F.2d 744	11

IV

Cases—Continued:

	Page
<i>Cohen v. California</i> , 403 U.S. 15	5, 12, 20, 21
<i>Eisner v. Stamford Board of Education</i> , 440 F.2d 803	9
<i>Epperson v. Arkansas</i> , 393 U.S. 97	18, 25
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726....	5, 9, 12, 13, 20
<i>Ginsberg v. New York</i> , 390 U.S. 629	16-17
<i>Goss v. Lopez</i> , 419 U.S. 565	18
<i>Katz v. Doyle</i> , 709 F.2d 251	19
<i>Miller v. California</i> , 413 U.S. 15	5, 9, 21, 23
<i>New Jersey v. T.L.O.</i> , No. 83-712 (Jan. 15, 1985) ..	10, 13, 17, 18
<i>Nicholson v. Board of Education</i> , 682 F.2d 858.....	10
<i>Prince v. Massachusetts</i> , 321 U.S. 158	17
<i>Roth v. United States</i> , 354 U.S. 476	5
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1	25
<i>Seyfreid v. Walton</i> , 668 F.2d 214	17
<i>Thomas v. Board of Education</i> , 607 F.2d 1043, cert. denied, 444 U.S. 1081	13
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503	4, 7, 8, 9, 10-11, 12, 13
<i>Trachtman v. Anker</i> , 563 F.2d 512, cert. denied, 435 U.S. 925	17
<i>Widmar v. Vincent</i> , 454 U.S. 263	22
<i>Wood v. Strickland</i> , 420 U.S. 308	23
<i>Wright v. Council of Emporia</i> , 407 U.S. 451.....	25

Constitution and statutes:

U.S. Const.:

Art. VII (Establishment Clause)	22
Amend. I	<i>passim</i>
Amend. IV	13, 17, 18
Department of Education Organization Act, 20 U.S.C. (& Supp. I) 3401 <i>et seq.</i>	1
Education Amendments of 1978, 20 U.S.C. 2701 <i>et seq.</i>	1
Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 <i>et seq.</i>	22

Constitution and statutes—Continued:	Page
§ 802(b), 98 Stat. 1302 (to be codified at 20 U.S.C. 4071(b))	27
42 U.S.C. 1983	3
Wash. Rev. Code Ann.:	
§ 28A.58.115 (Supp. 1986)	26
§ 28A.67.110 (1982)	16
Miscellaneous:	
C. Beard & M. Beard, <i>New Basic History of the United States</i> (rev. ed. 1968)	15
Diamond, <i>The First Amendment and Public Schools: The Case Against Judicial Intervention</i> , 59 Tex. L. Rev. 477 (1981)	14
Doggett, <i>A Discourse on Education</i> (1796)	14
<i>Essays on Education in the Early Republic</i> (F. Rudolph ed. 1965)	14
Mann, <i>Report of the Massachusetts Board of Education</i> (1848), in <i>An American Primer</i> (D. Boorstin ed. 1966)	15
2 S. Morison & H. Commager, <i>The Growth of the American Republic</i> (4th rev. ed. 1950)	15
<i>Random House Dictionary of the English Language</i> (1966)	23
Rush, <i>A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania; to Which are Added Thoughts Upon the Mode of Education, Proper in a Republic</i> (1786)	14
Webster, <i>On the Education of Youth in America</i> (1790)	14



In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1667

BETHEL SCHOOL DISTRICT NO. 403, ET AL., PETITIONERS

v.

MATTHEW N. FRASER, A MINOR, AND E.L. FRASER,
GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case raises important questions concerning the ability of school authorities to maintain minimum standards of decency and civility in public schools. While education is primarily the responsibility of state and local governments, the federal government provides substantial amounts of money to support programs in public schools. See, *e.g.*, Education Amendments of 1978, 20 U.S.C. 2701 *et seq.*; Department of Education Organization Act, 20 U.S.C. (& Supp. I) 3401 *et seq.* Those expenditures will be more fruitful to the extent that the recipient schools

are able to maintain an effective educational environment, and we believe that the Ninth Circuit's decision in this case improperly interferes with school officials' efforts to do so.

STATEMENT

1. Respondent, while a senior at Bethel High School in Tacoma, Washington, gave a brief nominating speech on behalf of another student before an assembly of the student body. The speech contained sexual innuendo, but no profane words.¹ The sexual innuendo provoked some hooting, and three students were observed simulating sexual behavior as a result of the speech.² The next day, a home economics teacher testified, her students were more interested in discussing respondent's speech than in their classwork, so she devoted approximately ten minutes to a discussion of the speech (Pet. App. A16).

A number of teachers complained to the administration about the speech (Pet. App. B5), and respondent was called into the assistant principal's office the day after he delivered the speech and asked to explain his conduct. At that meeting, respondent was informed that he had vio-

¹ Respondent stated (Pet. App. A2-A3 (citation omitted)):

"I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even to the climax, for each and every one of you.

So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be."

² A school counselor testified that he "had seen one student on the side of the bleachers where [he] was sitting actually simulate masturbation and two students on the opposite bleachers were simulating the sexual intercourse movement with hips" (Pet. App. A13).

lated the school's disruptive conduct rule, which states (*id.* at B4-B5 (citation omitted)): "Conduct which materially and substantially interferes with the educational process is prohibited including the use of obscene, profane language or gestures." Respondent was suspended for three days and his name was removed from the list of candidates for speaking at the school's graduation ceremony (*id.* at A6).³

2. Petitioner filed a grievance with the school district challenging the school's decision to discipline him. The hearing officer found that respondent had delivered his speech in a class prior to the assembly and that he had been advised by two teachers prior to the assembly that it was inappropriate (J.A. 101). The hearing officer concluded that the speech was "obscene" within the meaning of the disruptive conduct rule (*id.* at 104) because under that rule "obscene" has its "common and ordinary meaning," which includes language that is "indecent" (*id.* at 103). The hearing officer also concluded that a three-day suspension was warranted because respondent had been warned that the speech was inappropriate but nevertheless delivered it (*id.* at 104).⁴

Respondent then sued the school district under 42 U.S.C. 1983, seeking injunctive relief and damages. The district court ordered that any punishment imposed on respondent was null and void and enjoined the school officials from refusing to permit respondent to speak at his graduation exercises. The court based its order on its findings that respondent's speech was protected by the First Amendment and that the high school's disruptive conduct

³ Respondent nevertheless was elected to speak at graduation as a write-in candidate (Pet. App. A5).

⁴ The hearing officer's decision was based on a written record. The officer noted that respondent was advised that the District would provide an oral hearing if requested, but respondent did not request a hearing. J.A. 100. Respondent does not claim that the procedures followed by the District violated his right to due process.

rule is unconstitutionally vague and overbroad (Pet. App. B7-B8).⁵ The court subsequently awarded respondent \$278 as damages and \$12,750 as costs and attorney's fees (Pet. App. C4).⁶

3. The Ninth Circuit affirmed (Pet. App. A1-A65). The majority first noted (Pet. App. A7-A8), quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court also noted that "a student's First Amendment rights are not absolute; the limits of a student's right to express himself must be defined in light of the special characteristics of the school environment" (Pet. App. A7). Furthermore, the court stated that "'school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech, and . . . courts will not rest content with officials' bare allegation that such a basis existed'" (Pet. App. A8 (citation omitted)).

The court then rejected the School District's argument, based on the statement in *Tinker* that student speech is "not immunized by the constitutional guarantee of freedom of speech" if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" (393 U.S. at 513), that respondent's speech had materially disrupted the educational process. Reviewing

⁵ The district court also found that the suspension violated the state administrative code and that the removal of respondent's name from the list of candidates for graduation speaker violated due process (Pet. App. B9). We do not address the state law issue. The due process question is moot since respondent had been elected as a write-in candidate, the district court enjoined the school district from prohibiting him to speak, and he spoke without incident at the graduation ceremony (Pet. App. A43 n.13). The court of appeals vacated the injunction prohibiting respondent from speaking at his graduation as moot (Pet. App. A43).

⁶ This case might be moot but for the damage award.

the facts de novo (Pet. App. A10), the court concluded that the speech had not had such an effect.⁷

The court next rejected the school district's argument that, although the speech was not obscene,⁸ it was indecent and therefore, under *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), subject to regulation. The court found *Pacifica* inapplicable to this case because that case involved broadcasting into homes⁹ where young children could be exposed to the program in question, George Carlin's "Filthy Words" monologue. Accordingly, the court "decline[d] * * * to give public school officials power to regulate the speech of high school students they consider to be indecent" and held that "the First Amendment prohibited the District from punishing [respondent] for making a speech that school officials considered to be 'indecent'" (Pet. App. A32 (footnote omitted)).¹⁰

⁷ The court noted that "[t]he administration had no difficulty in maintaining order during the assembly and [respondent's] speech did not delay the assembly program" (Pet. App. A15). While the students' reaction to respondent's speech "may fairly be characterized as boisterous," the court concluded that it "was hardly disruptive of the educational process" (Pet. App. A17). Nor, in the view of the court of appeals, did the ten minute discussion in the home economics class the day after the speech amount to a material disruption (Pet. App. A16-A17).

⁸ The court noted (Pet. App. A23 n.5) that respondent's speech could not be considered obscene under the standard of *Miller v. California*, 413 U.S. 15, 24 (1973), so that it was not excluded from the protection of the First Amendment under *Roth v. United States*, 354 U.S. 476 (1957), as the School District conceded.

⁹ The court noted (Pet. App. A28 n.8) that, in *Cohen v. California*, 403 U.S. 15 (1971), this Court had emphasized the difference between the sanctuary of the home and public areas in holding that a state could not criminally punish a person for wearing a jacket bearing the words "Fuck the Draft" in a courthouse.

¹⁰ The court added: "We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as 'indecent' in controlling the speech of high school students, it would increase the risk of cementing white, middleclass standards for determining what is acceptable and proper speech and behavior in our public schools" (Pet. App. A30).

The court also rejected the School District's argument that "school officials may control the language used to convey ideas at school-sponsored events" (Pet. App. A33 (footnote omitted)). The court agreed that school officials had great control over the curriculum, but stressed that respondent's speech was not part of the curriculum, which it construed narrowly to mean classroom work. The court concluded that, because the assembly "was a voluntary activity in which students were invited to give their own speeches," it "was clearly not part of the school curriculum" (*id.* at A34).¹¹ This, in the court's view, made the assembly an "open forum" (*id.* at A41). The court concluded that since respondent's speech "was neither obscene nor disruptive, the First Amendment protects him from punishment by school officials" (*id.* at A42).

In a footnote (Pet. App. A43 n.12), the court affirmed the district court's ruling "that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent' even when engaged in an extra-curricular activity."

Judge Wright dissented (Pet. App. A44-A65). He found respondent's speech "crude and sexually suggestive" and argued that the majority had usurped "the authority of school officials to maintain and enforce minimum standards of decency in public schools" (*id.* at A44). Because schools "instill citizenship, discipline, and acceptable morals," Judge Wright noted, school authorities are entitled to "wide latitude" in condemning unacceptable language (*id.* at A53-A55). In his view, the school officials were fully justified under *Pacifica* in disciplining respondent, since his speech was inappropriate for a school assembly. Judge Wright would have held that "school authorities may prohibit indecent and vulgar

¹¹ The court noted that attendance at the assembly was not compulsory since students could choose to go to study hall instead (Pet. App. A34).

speech regardless of whether it satisfies *Tinker's* 'substantial disruption' standard" (Pet. App. A60).¹² Judge Wright also criticized the majority for its " cursory affirmation of the district court's holding that Bethel High School's disruptive conduct rule is unconstitutionally vague and overbroad," arguing that "[s]chool district rules are not held to the same due process standards for vagueness and overbreadth as criminal statutes" (*id.* at A63).

SUMMARY OF ARGUMENT

It is settled that students' speech is protected by the First Amendment. It is also settled, however, that students' First Amendment rights must be interpreted in light of the special characteristics of the school environment and that school officials may interfere with students' speech if they have a reasonable basis for doing so. While the court of appeals stated that the special characteristics of the school environment were relevant, it did not adequately take those characteristics into account in concluding that a student may deliver any speech at a school assembly so long as the speech is not physically disruptive or legally obscene. Contrary to the court of appeals' analysis, this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not limit school officials to prohibiting only speech that has a physically disruptive effect.

Proper analysis of the school environment in accordance with this Court's prior decisions leads to the conclusion that school officials have a reasonable basis for prohibiting the use of indecent language at school assemblies. Public schools have long been viewed as a means of inculcating basic values, including standards of civility and decency in speech. The authority of school officials to condemn indecent speech should not be less than their

¹² Judge Wright added that he thought that the majority took a constrained view of what constitutes disruption (Pet. App. A60).

authority to condemn the use of racial epithets or religious slurs, particularly in connection with regular school activities, or to require the use of standard respectful forms of address in the classroom. The conclusion that public school officials may reasonably prohibit indecent speech is reinforced by the fact that high school students do not have the full constitutional rights of adults, particularly in matters involving sexually suggestive material. Regulation of student speech in the high school environment should be permitted if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations do not, as in *Tinker*, suppress student expression of a particular political viewpoint.

The school officials reasonably concluded in this case that respondent's speech was indecent and that it violated the school's disruptive conduct rule. That rule, according to its plain meaning, prohibits indecent speech. School authorities have interpreted it that way, and it is their interpretation that controls. Since school officials may prohibit indecent speech, the rule is not constitutionally infirm. Nor was it improperly applied in this case. School authorities acted well within the scope of their discretion in determining that respondent violated the rule by delivering his speech to the assembled student body. Contrary to the court of appeals' conclusion, that assembly, while not a formal part of the curriculum, was not an open forum over which school officials had no control. Rather, students were assembled for the limited purpose of listening to speeches regarding the associated student body, an organization which, under state law, is regulated by local school officials. Students should not have to listen to indecent speech at such an assembly any more than they should have to endure racial epithets or religious slurs.

ARGUMENT

SCHOOL OFFICIALS ACTED REASONABLY IN SUSPENDING RESPONDENT

A. This Court's Decisions Do Not Hold That School Officials May Only Proscribe Speech That Causes Physical Disruption Or Is Legally Obscene

Although the Ninth Circuit correctly recognized certain basic principles that must govern application of the First Amendment in a school setting, it improperly adopted a rigid rule of decision that is neither compelled nor supported by this Court's decisions. The court of appeals held that school authorities cannot punish a high school student's speech unless it is obscene within the meaning of *Miller v. California*, 413 U.S. 15 (1974), or creates a physical disruption (Pet. App. A42). The court below relied primarily on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to support this holding. However, these cases in particular, and this Court's decisions in general, do not support the Ninth Circuit's basis for decision.

1. It is common ground that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 393 U.S. at 506). It is also well-established, as the court of appeals noted (Pet. App. A7), that those rights "must be construed 'in light of the special characteristics of the school environment.'" *Board of Education v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion), quoting *Tinker*, 393 U.S. at 506. The court of appeals also recognized, citing *Eisner v. Stamford Board of Education*, 440 F.2d 803, 810 (2d Cir. 1971), that school officials must demonstrate a "reasonable basis" for interference with student speech (Pet. App. A8), and that "'school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students'" (Pet. App.

A7, quoting *Nicholson v. Board of Education*, 682 F.2d 858, 863 (9th Cir. 1982)). If the Ninth Circuit had applied a standard based on these principles it is unlikely that we would have quarreled with its decision. Such a standard acknowledges that students have First Amendment rights while also permitting school officials to promulgate and enforce "rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 13.

While the court of appeals stated that analysis of the special characteristics of the school environment is required, it did not in fact evaluate those characteristics. Rather than giving weight to school officials' conclusions as to what rules are reasonable in the school environment, the court applied the sort of heightened scrutiny that is appropriate for review of government regulation of adult speech in a public forum. Nothing in this Court's decisions, however, bars school officials from promulgating and enforcing rules prohibiting indecent speech, or otherwise applying reasonable regulations to speech in the high school context, so long as the regulation is not a means for suppressing student expression of a particular political viewpoint.

2. The essential error of the court of appeals was to view the authority of school officials as being strictly limited to avoiding physical disruption of classrooms. The court of appeals interpreted *Tinker* to require an actual threat of physical disruption before any restriction may be imposed on a student's speech. That is a misreading of the Court's opinion.

In *Tinker* the Court interpreted the school's actions as censoring expression of a political viewpoint by banning the wearing of black armbands to protest the Vietnam War. The Court equated prohibition of the armbands with a regulation "forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property" (393 U.S. at 513). It was relevant to the Court's decision "that the school au-

thorities did not purport to prohibit the wearing of all symbols of political or controversial significance" (*id.* at 510), and the Court concluded that "a particular symbol . . . was singled out for prohibition" (*id.* at 510-511). Thus the Court in *Tinker* was confronted with a situation, not present on the facts of this case, where school officials acted with the apparent purpose and effect of eliminating one particular political viewpoint while allowing similar expression of other viewpoints. Indeed the Court's opinion expressly indicated that it did not purport to deal with situations involving school rules setting standards of decency and civility: "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or *deportment*" (*id.* at 507-508 (emphasis added)).

Moreover, the *Tinker* Court did not impose on school officials a standard as restrictive as that applied by the Ninth Circuit. The Court stated in *Tinker* that a student may express opinions "if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others" (393 U.S. at 512 (brackets in original), quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). The Court stressed the question of whether the speech in *Tinker* had disrupted classes because the district court in that case had upheld the school district's ban on the wearing of such armbands on the basis of a "fear of a disturbance from the wearing of the armbands" (393 U.S. at 508). It was in the context of addressing the "fear of disturbance" argument that the Court stated that conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment (*id.* at 513). But nothing in the Court's decision implies that school officials may *only* enforce rules proscribing actual disruption of classroom activities or that they cannot enforce rules establishing reasonable standards of civility and decency.

In finding a "material disruption" standard to be the exclusive standard for judging school officials' interference with student speech, the court of appeals held that "the rationales of *Pacifica* have no applicability" (Pet. App. A29). To be sure, the facts of *Pacifica* are distinguishable. As the court of appeals stressed, it involved broadcasting into homes where young children would be exposed to the indecent, but not obscene, broadcast in question. However, while attendance at a school assembly is in some ways different than sitting in "the sanctuary of the home" (*Cohen v. California*, 403 U.S. 15, 21 (1971) (citation omitted)), it is also true that the radio broadcast in *Pacifica* could be shut out by the listener, who would lose only the opportunity to hear the broadcast. If a student absented himself from the assembly where respondent recited his speech, in contrast, the student would lose the value of participation in an important student function (see pages 25-27, *infra*). In addition, while it is true, as the court of appeals stated, that high school students are not "impressionable young children" but are instead "young adults" (Pet. App. A29), high school students are not fully adult either. Recognizing that *Pacifica* presented a somewhat different factual context is not the same as concluding that it has no applicability to this case. Its relevance lies in its recognition that in some cases, particularly those involving minors, it is appropriate to regulate speech that is indecent but not obscene (see 438 U.S. at 732; *id.* at 756 (Powell, J., concurring in part and in judgment)).

Thus, contrary to the court of appeals's decision, *Tinker* and *Pacifica* do not mandate its conclusion (Pet. App. A42) that school officials may only prohibit speech that is legally obscene or physically disruptive. In *Tinker*, the Court determined that a material disruption of classroom activities would not be protected by the First Amendment, but it did not hold that school officials are barred from regulating speech in the absence of a

physical disruption when the regulation does not prohibit expression of a particular viewpoint. Similarly, in *Pacific* the Court held that indecent speech could be regulated under the facts of that case, but it did not hold that indecent language could never be prohibited in other cases. The court of appeals erred by not considering whether the special characteristics of the school environment that were not relevant in *Tinker* or addressed in *Pacific* permit reasonable regulation of indecent student speech.

B. The Special Role Of Public Schools, Which This Court Has Recognized, Shows That School Officials May Prohibit Indecent Speech Because They Are Charged With Inculcating Basic Values

This Court recently stated in *New Jersey v. T.L.O.*, *supra*, that school officials may prohibit conduct that would be perfectly permissible if undertaken by an adult if such regulation is reasonable.¹³ Proper analysis of the special characteristics of the school environment leads to the conclusion that school officials not only may prohibit speech that materially interferes with classroom activities but also may prohibit indecent speech and preserve basic standards of civility in the school environment. As Judge Newman stated (*Thomas v. Board of Education*, 607 F.2d 1043, 1057 (2d Cir. 1979) (concurring), cert. denied, 444 U.S. 1081 (1980)), "[s]chool authorities can regulate

¹³ In *New Jersey v. T.L.O.*, *supra*, the Court considered the Fourth Amendment rights of high school students in light of the special characteristics of the school environment. The Court concluded that "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject" (slip op. 13). In particular, the Court held that school officials need not obtain a warrant before searching a student and that searches of students need not be based on probable cause to believe that the student had violated the law (*id.* at 13-15). Therefore, a school official was justified in searching the purse of a student suspected of smoking in the school lavatory in violation of a school rule, even though smoking by adults is not illegal.

indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children."

1. An analysis of the special characteristics of the school environment relating to the use of indecent language by students begins with the understanding that public education in this country has traditionally been viewed not only as a means of teaching the skills needed to function in society, but also as a way of supplementing the family's role in the transmission of the society's basic values from one generation to the next. See Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 496-505 (1981). This concept of education as an institution to inculcate basic values was current in the earliest days of the Republic. Thus one writer stated that "education * * * will be immensely deficient, unless it be professedly extended to [students'] morality, as well as their literature." Dogget, *A Discourse on Education* (1796), in *Essays on Education in the Early Republic* 151 (F. Rudolph ed. 1965) [hereinafter cited as *Essays*]. Noah Webster expressed a similar view: "Education, in a great measure, forms the moral characters of men, and morals are the basis of government. Education should therefore be the first care of a legislature * * *." Webster, *On the Education of Youth in America* (1790) (footnote omitted), in *Essays* 64. Benjamin Rush, a signer of the Declaration of Independence, wrote an essay on public schools offering the opinion that "society owes a great deal of its order and happiness to the deficiencies of parental government being supplied by those habits of obedience and subordination which are contracted at schools." Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania; to Which are Added Thoughts Upon the Mode of Education, Proper in a Republic* (1786), in *Essays* 16.

Nineteenth Century reformers relied on the concept of education as a means of inculcating social and moral values as one of the principal arguments supporting the establishment of universal public elementary education. Horace Mann, extolling the importance of "moral education" and the "reformatory and elevating influence" of properly administered public schools, wrote that "the common school * * * may become the most effective and benignant of all the forces of civilization." Mann, *Report of the Massachusetts Board Of Education* (1848), in *An American Primer* 341, 343, 351 (D. Boorstin ed. 1966). Mann and other proponents of a public school system argued that education was a proper expense for the entire society to bear since "public education must prepare pupils for citizenship in the Republic * * *. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, *New Basic History of the United States* 228 (rev. ed. 1968). Horace Mann's concept reflected the practice of the time: "The average schoolma'am of that day was no less concerned with molding character than with molding mind, and to this purpose, too, the McGuffey Readers, with their pious axioms of conduct and their moral tales, contributed powerfully." 2 S. Morison & H. Commager, *The Growth of the American Republic* 306 (4th rev. ed. 1950).

That the public schools properly remain concerned with inculcating moral values as well as with imparting knowledge has been recognized by recent decisions of this Court. Public schools serve to "awaken[] the child to cultural values" (*Brown v. Board of Education*, 347 U.S. 483, 493 (1954)) and to "preserv[e] * * * the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). The Court recently agreed that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit

community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Board of Education v. Picq*, 457 U.S. 853, 864 (1982) (plurality opinion) (citation omitted). This function of public schools is also recognized in the statutes of the Washington State school system, which admonish public school teachers "to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism [and] to teach them to avoid idleness, profanity and falsehood." Wash. Rev. Code Ann. § 28A.67.110 (1982).

The point of this brief excursion into the history of public education is that public schools bear a different relationship to their students than any other level of government in our society bears to adult citizens. By focusing narrowly on the question whether behavior actually disrupts classwork, and ignoring whether behavior disrupts school officials' efforts to inculcate basic standards of civility and decency, the court of appeals did not properly consider the special characteristics of the school environment. Indeed, even assuming, as the court of appeals did, that only "disruptive" student speech may be regulated, an understanding of the role of public schools in our society shows that indecent speech disrupts the work of the school.

2. Another special characteristic of the school environment that the court of appeals ignored is that, at the high school level, school officials regulate the behavior of minors rather than adults. While children have constitutional rights, "the constitutional rights of children cannot be equated with those of adults." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). The special constitutional status of children limits their First Amendment rights, particularly where sexually suggestive material is involved. Thus in *Ginsberg v. New York*, 390 U.S. 629

(1968), the Court sustained a New York statute forbidding the sale to minors of sexually related material that was conceded not to be obscene and thus could not constitutionally have been prohibited for sale to adults. The Court "recognized that even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'" (*id.* at 638, quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). And in *Pico*, while the Court determined that it was not clear why school officials had removed certain books from a high school library (see 457 U.S. at 883 (White, J., concurring in judgment)), the Court assumed that school officials properly could remove books if they did so because the books were "pervasively vulgar" (*id.* at 871 (plurality opinion)). Indeed, the plurality noted that the committee charged with review of the books in question "was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' 'educational suitability,' 'good taste,' 'relevance,' and 'appropriateness to age and grade level'" (*id.* at 873 (citation omitted)).¹⁴

In other areas of constitutional analysis as well, this Court has recognized that regulation of the conduct of minors in schools demands special deference to school authorities. As mentioned above, in *New Jersey v. T.L.O.*, *supra*, the Court molded the requirements of the Fourth Amendment to fit the high school environment. The

¹⁴ The courts of appeals have recognized that school authorities may restrict student's First Amendment rights in ways that would not be permissible by government officials dealing with adults outside the school context. For example, in *Seyfreid v. Walton*, 668 F.2d 214, 220 (1981), the Third Circuit sustained a school superintendent's decision to cancel a school play which he found to be "vulgar and inappropriate because of sharp sexual overtones." Similarly, the Second Circuit sustained a school's decision to prohibit the distribution by a student newspaper of a questionnaire inquiring into students' sexual habits. *Trachtman v. Tucker*, 563 F.2d 512 (1977), 435 U.S. 925 (1978).

(Cort. David)

Court's crafting of procedural due process requirements for the school setting also has proceeded with reference to the needs of school officials for maintaining discipline. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court approached the question of what process is due a high school student facing suspension mindful of the admonition that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint By and large, public education in our Nation is committed to the control of state and local authorities'" (*id.* at 578, quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). More specifically, the Court sought to avoid over-formalizing the suspension process and creating an adversary atmosphere in order to assure that suspension would not grow "too costly as a regular disciplinary tool" and to preserve "its effectiveness as part of the teaching process" (*id.* at 583).¹⁵ In short, the constitutional right to due process was defined in *Goss*, as was the Fourth Amendment right in *T.L.O.*, so as not to interfere with the needs of discipline in the high school setting.

C. High School Officials May Regulate Students' Speech If They Do Not Suppress Expression Of A Particular Viewpoint

School officials are justified in insisting that all communications (whatever the content of their ideas) and interactions be conducted in ways marked by mutual respect and civility. Surely a student nominating speech which used racial epithets or religious slurs should be

¹⁵ In *Goss* the Court held that a high school student facing a suspension for not more than ten days must be given oral or written notice of the charges against him, an explanation of the evidence school authorities have, and an opportunity to present his side of the story (419 U.S. at 581). No delay is required between notice of the suspension and the student's opportunity to explain himself, and the Court defined several situations in which notice and hearing before the suspension may not be required (*id.* at 582).

liable to discipline with or without the showing of the kind of atmospheric reverberations which respondent's speech was shown to have occasioned here. Indeed, we submit that a ban on such slurs and epithets in the more formal context of classroom discussion or even the rough and tumble of an athletic contest would seem indispensable to most school authorities and should be recognized as proper by this Court. Similarly, and more affirmatively, if a school insisted that teachers be addressed as Mr. or Ms. and that some suitable form of address be used towards students themselves during class discussion, this too should be seen as a normal and constitutionally proper exercise of the school's civilizing mission.

The inculcation of attitudes of mutual respect between individuals, between racial and ethnic groups, and between the sexes is not only a valuable educational goal in itself, but also a precondition for the kind of rational exchange of ideas which is at the heart of what the First Amendment seeks to protect in the school context. In this broader perspective, sexually suggestive speech is not only contrary to ideas of decency but may contribute to an atmosphere which some students find demeaning or distracting, and thus an impediment to their studies.¹⁶ Indeed, it has become accepted in the courts of appeals that an employer unlawfully discriminates against some of his employees under Title VII if he creates a workplace in which highly offensive sexual remarks are commonplace. See, e.g., *Katz v. Dole*, 709 F.2d 251, 254-255 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 943-944 (D.C. Cir. 1981). It would be remarkable if the kinds of limits which an employer may be required to institute to maintain a proper atmosphere in

¹⁶ As Judge Wright observed in dissent in the court below, evidence was introduced in this case to show that respondent's speech was sexually harassing and demeaning to female students (Pet. App. A62).

an adult workplace, school administrators were prevented from enforcing in a high school.

Thus, a proper understanding of the role of public schools and the constitutional status of high school students requires that school officials be permitted some regulation of speech based on its content. Regulation of student speech in the high school environment should be permitted if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint.

Regulation on the basis of content is, of course, the exception rather than the rule (see *Pacifica*, 438 U.S. at 761 & n.3 (Powell, J., concurring in part and in judgment)). And, as the court of appeals noted, respondent was punished for "the language and verbal imagery he used" (Pet. App. A42), regulation which at least to some extent affects the content of speech. But as we have noted, and as the Court recognized in *Pacifica* (438 at 744-748 (Stevens, J.); *id.* at 757-759 (Powell, J., concurring in part and in judgment); *id.* at 768 n.3 (Brennan, J., dissenting)), some degree of content-based regulation is permissible with respect to indecent speech aimed at minors. In this respect, it is important to keep in mind that a prohibition on indecent language does not restrict the "marketplace of ideas" to any significant extent (see *id.* at 745-746 (Stevens, J.)). Furthermore, restrictions on the use of indecent language are "viewpoint neutral" since most viewpoints can be expressed without the use of vulgar language.¹⁷ The only sense in

¹⁷ We are not unmindful of Justice Harlan's warning in *Cohen v. California*, *supra*, that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process" (403 U.S. at 26). While we accept the force of this observation in a public forum context, it certainly must be open to school officials to guide and even to control students' choice of words. To hold otherwise would

which a restriction on the use of indecent language at school is not viewpoint neutral is that the restriction shows that school officials disapprove of the use of such language. But in our view school officials may reasonably conclude—indeed, they ought to conclude—that it is their duty to teach high school students that indecent language is not an acceptable part of civilized public dialogue.

That school officials must be permitted to prohibit indecent speech is seen most clearly by considering the effect of the Ninth Circuit's ruling in cases involving speech that is not obscene under the standards set out in *Miller v. California*, 413 U.S. 15, 24 (1973). The "Filthy Words" monologue at issue in *Pacifica* of course did not meet the *Miller* standards (see 438 U.S. at 756 (Powell, J.)). Yet, that monologue (the text of which is set out in 438 U.S. at 751-755) is obviously inappropriate for delivery at a school assembly. Under the Ninth Circuit's holding, however, a student could not be punished for delivering such a speech to assembled high school students in the absence of a more serious physical disturbance than the one that accompanied and followed respondent's speech. Similarly, since Cohen's jacket was not legally obscene (see 403 U.S. at 20), any student would be free to wear such a jacket in school, under the Ninth Circuit's decision, as long as a physical disturbance did not result. Such a result obviously impedes school authorities' proper efforts to maintain standards of decency and civility. A proper understanding of the role of high schools leads to the conclusion, as Judge Newman stated, that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket" (607 F.2d at 1057 (concurring)).

undercut not only the imposition of standards of decency and civility but even, carried to extreme, an English teacher's efforts to require that the rules of grammar be followed.

D. The Conception Of Free Speech Urged Here Is Consistent With The Government's Position In *Bender v. Williamsport Area School District*

We recently argued, in *Bender v. Williamsport Area School District*, No. 84-773 (argued Oct. 12, 1985), that the Establishment Clause does not prevent school officials from permitting a voluntary student religious group from meeting on school property during an activities period. In that connection, we recognized that high school students have free speech rights (U.S. Amicus Br. at 20-21). We argued that high school students are essentially no different than the college students involved in *Widmar v. Vincent*, 454 U.S. 263 (1981), in terms of their ability to understand that permission to meet did not amount to endorsement of religion by school officials; and that the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*, represents Congress' considered conclusion to that effect. This conclusion is wholly consistent with the position we urge here.

First, our principal contention in *Bender* was that the Establishment Clause does not *require* school administrators to discriminate against religious speech in contexts where a wide variety of forms of speech are permitted. This case, of course, does not involve the Establishment Clause. Second, we argued in *Bender* that the Equal Access Act precluded such discrimination where a secondary school maintains a limited open forum under certain defined circumstances. The assembly involved in this case was not that type of forum (see pages 25-27, *infra*). Third, a ban on all religious speech responds to concerns which are quite different from those which might motivate a school to ban indecent speech or racial epithets. The latter ban goes far more to tone and style than to content. Finally, the principal argument confronted by petitioners in *Bender* was the fear that they, unlike the college students in *Widmar*, would not be able to discern the difference between official endorsement and mere permission. The Equal Access Act traverses

that factual assumption. The fact that high school students are mature enough to discern that schools are not officially endorsing religion when they permit a voluntary student religious group to meet does not mean that these students are not in need of the school's guidance in matters of civility and decency.

F. The School District Reasonably Enforced Its Rule In This Case

The actions taken by the Bethel School District in this case were reasonable. First, its disruptive conduct rule prohibited the use of indecent language, which, as we have shown, is permissible, and the rule is not unconstitutional. Second, school officials reasonably applied the rule to punish respondent.

1. The School District's rule prohibits "the use of obscene, profane language or gestures." As the hearing officer concluded (J.A. 103), school officials intended this rule to be interpreted according to the plain meaning of the words, not according to the definition of "obscene" developed by this Court.¹⁸ "Obscene" means "offensive to modesty or decency; indecent, lewd." *Random House Dictionary of the English Language* 994 (1966). Thus, the rule prohibits indecent language.

It is clear that the school officials' interpretation of the meaning of the rule controls and that the rule is not open to interpretation by the federal courts. As this Court noted in *Wood v. Strickland*, 420 U.S. 308, 326 (1975), 42 U.S.C. 1983 "does not extend the right to relitigate in federal court * * * the proper construction of school regulations." That conclusion was repeated in *Board of Education v. McCluskey*, 458 U.S. 966, 970 (1982) (per curiam), where the Court held that a court of appeals erred in determining, contrary to the conclu-

¹⁸ In *Miller v. California*, 413 U.S. 15, 18-19 n.2 (1973), the Court noted that its definition of "obscene" is different than the dictionary meaning.

sion of school officials, that a school rule prohibiting students from being under the influence of "drugs" on school property was a proper basis for suspending a student who was drunk at school. The Court held that it was up to the school board, not the federal courts, to determine whether "drugs" included alcohol. Therefore, the school district's determination that "obscene" means "indecent" is not open to question. Furthermore, school officials determined that the use of indecent language by itself is disruptive of the educational process, by including the use of indecent language in its "disruptive conduct" rule. As we have shown, that conclusion is reasonable.

The court of appeals in this case appeared to accept the school district's interpretation of its rule as prohibiting the use of indecent language, holding that "the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent'" (Pet. App. A43 n.12). It was on the basis of its conclusion that the First Amendment barred the school district from prohibiting indecent speech at a school assembly that the court of appeals determined that the rule is unconstitutional. There is no reason to invalidate the rule, even under the court of appeals' approach, once it is understood that school officials may prohibit the use of indecent language.

2. Nor is there any basis for challenging the application of the rule to respondent. It is the function of school officials rather than federal courts to determine what type of speech violates the appropriate standard of decency. Indeed, that kind of determination is part of the ordinary daily business of classroom teachers as well as school superintendents. As noted above, this Court has "long recognized that local school boards have broad discretion in the management of school affairs" and that "federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation

of school systems.' " *Pico*, 457 U.S. at 863-864 (1982) (plurality opinion)), quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Whether respondent's speech violated the school's disruptive conduct rule is a matter best left to school officials, who are most familiar with the appropriate standard of decency to be applied. They determined that the speech was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly" (J.A. 103). Since that conclusion is quite reasonable, there is no warrant for reevaluation of the school officials' determination.

The court of appeals was troubled (Pet. App. A30-A31) that decisions of school authorities as to what constitutes indecent speech will inevitably vary from one community to another. However, in concluding that the First Amendment precludes enforcement of community standards of decency in the schools because other communities may have different standards (*ibid.*), the court of appeals misunderstood the nature of public schools. This Court has recognized that "local sharing of responsibility for public education" is a vital part of the American tradition, allowing parents, through their local school board, "[d]irect control over decisions vitally affecting the education of [their] children." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49 (1973), quoting *Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972). As the Court also recognized, a consequence of local control is that "[e]ach locality is free to tailor local programs to local needs" (411 U.S. at 50). The fact that, under this system, different schools may adopt different standards of civility and decency is a sign of the strength and vitality of the system; it is not a reason to conclude that school officials are confined to standards representing the lowest common denominator.

Finally, the court of appeals emphasized that respondent's speech was delivered at a school assembly rather than in a classroom. In the court's view, the fact

that the assembly was an "extra-curricular activity" (Pet. App. A38) in the sense that it was not a classroom activity is highly significant. But the facts in the record, which the court below reviewed *de novo*, do not support the court of appeals' treatment of the assembly as something apart from the school's formal activities and its characterization of the assembly as an open forum.

While not a formal part of the curriculum, the assembly at which respondent delivered his nominating speech was an exercise in which the regular life of the school was formally implicated. Under Washington law, the associated student body is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district." Wash. Rev. Code Ann. § 28A.58.115 (Supp. 1986). Two characteristics of the assembly at which Fraser spoke are clear from this statutory authorization.

First, the student government process is subject by statute to regulation by the governing body of the school just as the school curriculum is. Thus, the statute confirms what common sense suggests. While school officials' authority to maintain standards of decency may not extend beyond school property or school functions, their authority clearly extends beyond individual classrooms to the hallways and assembly rooms of their schools.

Second, the Washington state statute creates a "formal organization of the students." Thus the assembly was part of the regular, general processes of the school in which students could expect to be able to participate. The court below made much of the fact that students who did not wish to attend the assembly and be subject to the offense of Fraser's remarks could instead attend a study hall. But the court's proposed solution has the defect of requiring students to forego the opportunity to participate in a function that the school and Washington state law have provided for their benefit. Students wishing to participate in the regular, general processes of the school had to subject themselves to respondent's distasteful re-

marks. It is our position that a student should no more have to accept this as a feature of his school activities than he should have to endure racial epithets or religious slurs.

The court of appeals' treatment of the school assembly as the equivalent of an "open forum" highlights the court's willingness to substitute its own judgment about how a school should function for that of school administrators. The court of appeals recognized that the assembly was part of the educational process in that it gave "students an opportunity to gain practical experience in the democratic process" (Pet. App. A41). Having recognized the didactic function of the assembly, the court of appeals nonetheless insisted on enforcing *its* view of how the assembly could be made a learning experience for the students. To the contrary, it follows from the court's characterization of the function of the assembly that school officials could properly insist on the maintenance of standards of decency and civility, not that they were required to abdicate their duty to teach such standards. Indeed, school officials might conclude that the opportunity to teach appropriate standards of decency and civility is greatest at assemblies and that, conversely, respondent's ability to undermine the school's responsibility to inculcate such values is greatest at an assembly of the entire student body.

Thus, the assembly was not an "open forum," as the court of appeals stated (Pet. App. A41), or even a "limited open forum" of the sort described in the Equal Access Act, Pub. L. No. 98-377, § 802(b), 98 Stat. 1302 (to be codified at 20 U.S.C. 4071(b)); pages 22-23, *supra*. The assembly was not open to different groups, but was provided for the express purpose of permitting speeches by candidates for the associated student body and by students nominating candidates. There is no basis for the court of appeals' treatment of the assembly as beyond the ordinary control of school authorities over school functions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED

Solicitor General

RICHARD K. WILLARD

Assistant Attorney General

CAROLYN B. KUHL

Deputy Solicitor General

CHRISTOPHER J. WRIGHT

Assistant to the Solicitor General

ANTHONY J. STEINMEYER

ROBERT V. ZENER

Attorneys

DECEMBER 1985



Supreme Court, U.S.

FILED

DEC 20 1985

JOSEPH F. SPANIOL, JR.
CLERK

(10)
No. 84-1667

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; CHRISTY B. INGLE; DAVID
C. RICH; J. BRUCE ALEXANDER; and GERALD E. HOSMAN,
Petitioners,

vs.

MATTHEW N. FRASER, a Minor, and
E.L. FRASER as his Guardian Ad Litem,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE STUDENT PRESS
LAW CENTER IN SUPPORT OF RESPONDENTS

J. MARC ABRAMS
Counsel of Record
Attorney for Amici Curiae
300 Park Avenue
New York, New York 10022
212-909-7438

Of Counsel:
S. MARK GOODMAN
Student Press Law Center
800 18th St., N.W.,
Washington, D.C. 20003
202-466-5242

BEST AVAILABLE COPY

QUESTIONS PRESENTED

A. Main Question:

Based upon the facts found by the district court and other evidence in the record, did the Court of Appeals correctly conclude that there is no basis for reversing the decision of the district court?

B. Subsidiary Questions:

- (1) Is it violative of the First Amendment for a public [secondary] school district to punish a student for uttering otherwise protected speech in a public forum?
- (2) Is the School District's Disruptive Conduct Rule which fails to define key terms unconstitutionally vague and overbroad on its face under the First and Fourteenth Amendments?
- (3) Is the School District's Disruptive Conduct Rule unconstitutional as applied when a student is punished for speech which is not obscene but merely includes "sexual innuendo," thus violating the student's right of due process under the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Forums for Student Expression in Public Schools Enjoy Broad Pro- tection Under the First and Four- teenth Amendments to the Con- stitution	7
II. The Bethel School District Uncon- stitutionally Punished Protected Speech	11
A. The Student Candidate As- sembly Was A Forum for Student Expression	11
B. Forums for Student Expres- sion May Not Be Abridged Absent Extreme Conditions ...	12

	Page
III. The Bethel School District Guidelines Are Unconstitutionally Vague and Overbroad and Thus Could Not Be Used To Silence a Forum	15
IV. The Application of the Bethel School District Policy Was Unconstitutional	21
A. No Material and Substantial Disruption of the School Environment Resulted From Fraser's Speech	21
B. Fraser's Speech Was Not Obscene	26
C. Fraser's Suspension Constituted a Violation of His Right To Due Process and Equal Protection Under the Law as Guaranteed By the Fourteenth Amendment	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	PAGES
<i>Antonelli v. Hammond</i> , 308 F. Supp. 1329 (D. Mass. 1970)	9, 23
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	8
<i>Baughman v. Freienmuth</i> , 478 F. 2d 1345 (4th Cir. 1973)	12, 14, 15, 16, 17
<i>Bayer v. Kinzler</i> , 383 F. Supp. 1164 (E.D.N.Y. 1974), <i>aff'd without op.</i> , 515 F.2d 504 (2d Cir. 1975)	10
<i>Bazaar v. Fortune</i> , 476 F.2d 570, <i>aff'd en banc per curiam</i> , 489 F.2d 225 (5th Cir. 1973), <i>cert. denied</i> , 416 U.S. 995 (1974)	9
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	16
<i>Board of Education, Island Trees Union Free School District v. Pico</i> , 457 U.S. 853 (1982)	11, 13
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	13
<i>Burnside v. Byars</i> , 363 F.2d 744 (5th Cir. 1966)	12, 25
<i>Butts v. Dallas Independent School District</i> , 436 F.2d 728 (5th Cir. 1971)	23

	PAGES
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	13
<i>Cintron v. State Board of Education</i> , 384 F. Supp. 674 (D.P.R. 1974)	15, 17
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	19
<i>Collin v. Smith</i> , 447 F. Supp. 676 (N.D. Ill.), <i>aff'd</i> , 578 F.2d 1197 (7th Cir.), <i>cert. denied</i> , 439 U.S. 916 (1978)	8
<i>Cornelius v. NAACP Legal Defense and Educational Fund</i> , 105 S. Ct. 3439 (1985)	7
<i>Eisner v. Stamford Board of Education</i> , 440 F.2d 803 (2d Cir. 1971)	14, 15
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	14, 20
<i>Fernandes v. Limmer</i> , 465 F. Supp. 493 (N.D. Tex. 1979), <i>modified</i> , 663 F.2d 619 (5th Cir. 1981), <i>cert. dismissed</i> , 458 U.S. 1124 (1982)	8
<i>Fraser v. Bethel School District No. 403</i> , No. C-83-306T (W.D. Wash. June 8, 1983) (unreported)	4

	PAGES
<i>Fraser v. Bethel School District</i> No. 403, 755 F.2d 1356 (9th Cir. 1985)	4, 11, 12, 18, 22
<i>Fujishima v. Board of Education</i> , 460 F.2d 1355 (7th Cir. 1972)	15
<i>Gambino v. Fairfax County School</i> <i>Board</i> , 429 F. Supp. 731 (E.D. Va.), <i>aff'd per curiam</i> , 564 F.2d 157 (4th Cir. 1977)	1-2, 10, 14
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	26
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975)	27
<i>Hall v. Board of School Commissioners</i> <i>of Mobile County, Alabama</i> , 681 F. 2d 965 (5th Cir. 1982)	16, 17-18
<i>Healy v. James</i> , 408 U.S. 169 (1972)	8
<i>Hernandez v. Hanson</i> , 430 F. Supp. 1154 (D. Neb. 1977)	15
<i>Jacobs v. Board of School</i> <i>Commissioners</i> , 349 F. Supp. 605 (S.D. Ind. 1972), <i>aff'd</i> , 490 F.2d 601 (7th Cir. 1973), <i>vacated per curiam</i> , 420 U.S. 128 (1975)	15, 17, 19
<i>Koppell v. Levine</i> , 347 F. Supp. 456 (E.D.N.Y. 1972)	19
<i>Kuhlmeier v. Hazelwood School</i> <i>District</i> , 607 F. Supp. 1450 (E.D. Mo.), <i>appeal docketed</i> , No. 85-1614EM (8th Cir. 1985)	1

	PAGES
<i>Lee v. Board of Regents</i> , 306 F. Supp. 1097 (W.D. Wis. 1969), <i>aff'd</i> , 441 F.2d 1257 (7th Cir. 1971)	10
<i>Leibner v. Sharbaugh</i> , 429 F. Supp. 744 (E.D. Va. 1977)	15, 17, 24
<i>Miller v. California</i> , 413 U.S. 15 (1973)	13, 26
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	16
<i>National Socialist White People's Party v. Ringers</i> , 473 F.2d 1010 (4th Cir. 1973)	8
<i>Nebraska Press Association v. Stuart</i> , 427 U.S. 539 (1976)	8
<i>New Jersey v. T.L.O.</i> , ____ U.S. ____, 105 S.Ct. 733 (1985)	12-13
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	13
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	13
<i>Nicholson v. Board of Education Torrance Unified School District</i> , 682 F.2d 858 (9th Cir. 1982)	14
<i>Nitzberg v. Parks</i> , 525 F.2d 378 (4th Cir. 1975)	14, 15, 16, 17

	PAGES
<i>Papish v. Board of Curators of University of Missouri</i> , 410 U.S. 667 (1973)	8, 19, 23
<i>Poxon v. Board of Education</i> , 341 F. Supp. 256 (E.D. Cal. 1971)	15-16
<i>Peterson v. Board of Education of School District No. 1</i> , 370 F. Supp. 1208 (D. Neb. 1973)	17
<i>Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations</i> , 413 U.S. 376 (1973)	13
<i>Pliscou v. Holtville Unified School District</i> , 411 F. Supp. 842 (S.D. Cal. 1976)	15
<i>Quarterman v. Byrd</i> , 453 F.2d 54 (4th Cir. 1971)	15
<i>Reineke v. Cobb County School District</i> , 484 F. Supp. 1252 (N.D. Ga. 1980)	10
<i>Scoville v. Board of Education of Joilet</i> , 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970)	19
<i>Seyfried v. Walton</i> , 668 F.2d 214 (3d Cir. 1981)	11
<i>Shanley v. Northeast Independent School District</i> , 462 F.2d 960 (5th Cir. 1972)	14, 15, 16, 22

	PAGES
<i>Solmitz v. Maine School Administrative District No. 59, 495 A.2d 812 (Me. 1985)</i>	1
<i>Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)</i>	7
<i>Stanton v. Brunswick School Department, 577 F. Supp. 1560 (D. Me. 1984)</i>	9-10
<i>Sullivan v. Houston Independent School District (Sullivan I), 307 F. Supp. 1328 (S.D. Tex. 1969)</i>	23
<i>Sullivan v. Houston Independent School District (Sullivan II), 475 F.2d 1071 (5th Cir.), cert. denied, 414 U.S. 1032 (1973)</i>	24
<i>Time, Inc. v. Hill, 385 U.S. 374 (1967)</i>	13
<i>Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)</i>	8, 10, 12, 13, 21-22, 23, 24, 25, 26, 29
<i>Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) cert. denied, 435 U.S. 925 (1978)</i>	24, 25
<i>Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971)</i>	9

	PAGES
<i>Vail v. Board of Education</i> , 354 F. Supp. 592 (D.N.H.), <i>vacated and remanded</i> , 502 F.2d 1159 (1st Cir. 1973)	22
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	10
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	9, 12
<i>Williams v. Spencer</i> , 622 F.2d 1200 (4th Cir. 1980)	1, 16
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	28
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977)	13
<i>Zucker v. Panitz</i> , 299 F. Supp. 102 (S.D.N.Y. 1969).	10

INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae Student Press Law Center is submitted to the Court with the consent of the parties to the case, and their letters of consent will be filed with the Clerk of the Court.

The Student Press Law Center is a national, non-profit, incorporated, legal research, information and advocacy organization formed for the purpose of promoting and preserving the First and Fourteenth Amendment rights of high school and college journalists. The Center's board of directors includes representatives of the major national organizations of high school journalism teachers and students such as Journalism Education Association, National Scholastic Press Association, Quill and Scroll Society, Columbia Scholastic Press Association and Columbia Scholastic Press Advisers Association. While the main focus of the Student Press Law Center is freedom of the press, in the years since the organization's founding in 1974, the Center has recognized that all aspects of student freedom of speech are closely linked and has supported student expression outside the student media. To those ends, the Student Press Law Center has collected information on student speech cases around the country, submitted numerous *amicus* briefs, most recently in *Kuhlmeier v. Hazelwood School District*, 607 F. Supp. 1450 (E.D. Mo.), appeal docketed, No. 85-1614EM (8th Cir. 1985), and *Solmitz v. Maine School Administrative District No. 59*, 495 A.2d 812 (Me. 1985), and litigated two student First Amendment Cases: *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), and *Gambino v. Fairfax County School Board*, 429 F. Supp. 731

(E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977).

The Student Press Law Center finds that in learning the responsibilities of democracy, students in many high schools face a common problem: the difficult task of speaking out and being heard despite the opposition of their school administrators. Because of the impact this litigation will have on high schools across the nation, and because the Student Press Law Center is the nation's only organization devoted solely to protecting student First Amendment rights, *amicus* has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

In April 1983, Respondent, Matthew Fraser ("Fraser"), was a senior at Bethel High School, a public school in Washington State run by Petitioner, Bethel School District No. 403. At an attendance-voluntary assembly held prior to elections for student body officers, Fraser delivered the following speech on behalf of a vice-presidential candidate:

I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm. But most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds.

Jeff is a man who will go to the very end, even the climax, for each and every one of you.

So vote for Jeff for A.S.B. Vice President. He'll never come between you and the best our high school can be.

Fraser used puns and double entendres as rhetorical tools. He was successful; his candidate was elected to office with a sizable majority.

Shortly thereafter, Fraser was suspended for three days as a direct result of his address, and served two days of that suspension. His name was removed from the ballot for graduation speaker. The record

indicates that other students had not been punished for similar acts in the past.

In *Fraser v. Bethel School District No. 403*, No. C83-306T (W.D. Wash. June 8, 1983) (unreported), the United States District Court for the Western District of Washington ruled totally in Fraser's favor, finding a violation of his First Amendment rights and his rights under state law. The court further held that the school's disciplinary rules were unconstitutionally vague and overbroad, and that defendant school district's conduct violated Fraser's due process rights under the Fourteenth Amendment to the United States Constitution. An appeal ensued and the judgment was affirmed by the United States Court of Appeals for the Ninth Circuit, 755 F.2d 1356 (9th Cir. 1985). The case is before this Court on writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The School District violated Fraser's rights under the First and Fourteenth Amendments to the Constitution when it punished him for delivering to a forum for public expression a political speech which contained no language falling outside the realm of protected communication.

It is clear that the assembly at which Fraser spoke was a public forum: it was organized by students for the purpose of disseminating information about candidates in an upcoming election. The District had no authority to regulate speech in the forum, nor to punish such speech after the event. The fact that the speech took place in school does not work to deprive Fraser of his rights, and the District has shown neither the need to restrict speech nor the requisite conditions for such a restriction in the instant case.

The District has further overstepped the bounds of constitutionally permissible behavior by attempting to enforce a rule regulating disruptive conduct which fails to conform to legal requirements. The regulation in question fails to define key terms, is overbroad and vague, and attempts to carve out an entirely new realm of unprotected speech -- non-obscene innuendo -- which goes well beyond what any court has been willing to consider.

Even assuming the constitutionality of the guidelines in question, the School District acted impermissibly in punishing speech from which no substantial disruption resulted. The District confuses the boisterous nature of high school students

with a threat to the maintenance of order in the educational process. It further incorrectly asserts that the slight unconventionality of Fraser's speech is on its own disruptive without any further showing. Arguments presented by the District that its duty to "inculcate community standards of decency" overwhelms all First Amendment considerations are without merit, as are the District's assertions that Fraser's speech was somehow intrusive and harmful to students.

Finally, the District abridged Fraser's rights with an appeals process that offered insufficient right to be heard and a system of punishment which discriminatorily singled out Fraser while ignoring similar "transgressions."

ARGUMENT

I. FORUMS FOR STUDENT EXPRESSION IN PUBLIC SCHOOLS ENJOY BROAD PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

This Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property or facilities to some intended purpose outweighs the interest of those wishing to use it for other purposes. *Cornelius v. NAACP Legal Defense and Educational Fund*, 105 S. Ct. 3439, 3448 (1985). "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 3449.

Moreover, the Court has also ruled that if the state establishes a "public forum," then the state cannot censor the expression which takes place in that forum. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). If, for example, a city were to allow plays, speeches and meetings at a civic auditorium, that auditorium would be a "public forum," and the city would violate the Constitution if it were to deny use of the auditorium for the production of a play solely because it would offend the sensibilities of city officials. *Id.* The same principle has been used to recognize as public forums city parks, school auditoriums and airports and to guarantee that such groups as the Hare Krishnas or the Nazi Party have the right to engage in expressive

activities in those forums free of government censorship. *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979), *modified*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

Further, this Court has consistently and unambiguously stated that restraints on expression are among the most disfavored acts in our constitutional system. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). This is no less true in our nation's public schools. Over fifteen years ago, the U.S. Supreme Court first explicitly recognized that public school students enjoy First Amendment protections. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Since *Tinker*, the Court has handed down several decisions dealing with the free speech rights of students. While all of the cases dealt with college students, the rules announced are equally applicable in the high school setting. In *Healy v. James*, 408 U.S. 169 (1972), the Court held that a college could not refuse to recognize the group merely because it disagreed with the group's philosophy or because it had an undocumented fear of a disruption. In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973), decided a year later, a college student was expelled for distributing a highly offensive newspaper on campus. The paper carried a political cartoon which depicted policemen raping the Statue of Liberty and the Goddess of Justice and a

headline announcing: "Motherfucker Acquitted." In concluding that the expulsion violated Papish's First Amendment rights, the Court held that the newspaper was not "obscene," was not likely to cause a disruption of the school and therefore could not be censored. And in a 1981 case, *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that a state university policy prohibiting the use of otherwise generally available school facilities for religious workshops or religious teaching violates students' rights to freedom of speech and association.

Many other courts have recognized the existence of forums in public schools and thus applied strong limitations to the censoring activity of school officials. As these courts have recognized, a determination of student activity as curricular or extra-curricular, school-sponsored or student-sponsored, is irrelevant if a forum is found to exist. Labeling an outlet for student expression as an "instructional tool" will not allow school administrators unbridled control when a forum has in fact been created. *Trujillo v. Love*, 322 F. Supp. 1266, 1268 (D. Colo. 1971). "The state is not necessarily the unrestrained master of what it creates and fosters." *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970). When a school gives students an unrestrained opportunity to speak to a relevant public on issues that concern them, even though it may occur on school grounds for school credit and involve the use of school funds and facilities, the school has clearly created a free speech forum for student expression that can be controlled only according to constitutional dictates. *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc per curiam*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Stanton v. Brunswick*

School Department, 577 F. Supp. 1560 (D. Me. 1984); *Reineke v. Cobb County School District*, 484 F. Supp. 1252 (N.D. Ga. 1980); *Gambino v. Fairfax County School Board*, 429 F. Supp. 731 (E.D. Va.), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without op.*, 515 F.2d 504 (2d Cir. 1975); *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

After more than 15 years, *Tinker* remains the dispositive statement on student free speech rights. In *Tinker*, this Court stated that students "are 'persons' under our Constitution...possessed of fundamental rights which the State must respect.... 393 U.S. at 511. Absent a showing of "material and substantial interference with schoolwork or discipline," schools cannot restrain the full First Amendment rights of their students. *Id.* This holding flows directly from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where this Court stated that:

"[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

II. THE BETHEL SCHOOL DISTRICT UNCONSTITUTIONALLY PUNISHED PROTECTED SPEECH

A. The Student Candidate Assembly Was A Forum for Student Expression

Bethel High School administrators had clearly created a forum for student expression in the student government candidate assembly. The activity was student-organized and involved only student speakers. RT at 52; *Fraser v. Bethel School District No. 403*, 755 F.2d at 1364. Although Fraser chose to present his speech to three teachers for comment, RT at 52, Complaint para. 10, the school clearly did not require such approval. In the same assembly a year earlier, a student gave a speech that contained sexual innuendo and four-letter words. RT at 52. Unlike the situation at issue in *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (high school dramatic performance rejected by school officials because of its sexual content), students at Bethel High School were given complete authority to write and deliver their own speeches. *Seyfried* found no violation of student First Amendment rights because it did not involve a forum for student expression. The dramatic performance to which school administrators objected in that case was selected by teachers, without student participation. Similarly, the decision of this Court in *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), involved only the removal by high school officials of books from library shelves, not their censorship of a forum for student expression.

As the Court of Appeals in this case noted, it is to the credit of Bethel High School officials that they created an open forum for students to express their political views. "[W]hen they did so they implicated the fundamental right of participation in the process of self-government, albeit student government." *Fraser* 755 F.2d at 1365. Once the school had created such a forum for student expression, it "assumed an obligation" to justify its censoring actions "under applicable constitutional norms." *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

B. Forums for Student Expression May Not be Abridged Absent Extreme Conditions

Freedom of speech and freedom of the press are not absolute rights, but this Court and other courts have made clear that schools may not freely trample these rights by disregarding the clear body of the law in the area. As this Court in *Tinker* recognized, students are not accorded First Amendment rights coextensive with those of adults. *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973). However, even considering the particular characteristics of the high school environment, the Court in *Tinker* announced that it would allow restriction only of that student expression which "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school..." *Tinker*, 303 U.S. at 509, citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). Nor did this Court weaken high school students' First Amendment rights in *New Jersey v. T.L.O.*, ___ U.S. ___, 105 S.Ct. 733 (1985). Petitioners misinterpret this decision, and rely on it as their sole support for the propo-

sition that schools may abridge student constitutional rights. *T.L.O.* specifically stated that it did not apply to cases involving student expression. *Id.* at 741.

This Court has recognized nine broad categories of unprotected speech: obscenity, *Miller v. California*, 413 U.S. 15 (1973); defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); incitement to imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); invasion of privacy, *Time, Inc. v. Hill*, 385 U.S. 374 (1967); advertisements for illegal products or services, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); copyright violations, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); matters involving national security, *New York Times Co. v. United States*, 403 U.S. 713 (1971); and speech that materially and substantially disrupts school activities, *Tinker*, at 509.

As discussed in Section IV, *infra*, petitioner asserts only that the last of these categories of speech occurred in the incident at bar, and additionally claims the existence of a new form of unprotected speech: sexual innuendo. Case law makes clear that the latter is an insufficient reason for punishing speech, and the former in fact did not occur here.

Restricting and punishing free speech in a forum for student expression is permissible only in extreme conditions. Petitioners do not show such circumstances existed here, nor do cases cited by petitioner justify their extraordinary actions. *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), did not involve

student speech at all. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), involved the heavily-regulated broadcast industry and audiences inadvertently exposed to radio programs. *Nicholson v. Board of Education Torrance Unified School District*, 682 F.2d 858 (9th Cir. 1982), cited throughout this litigation, was distinguished in the instant case by the very court which rendered the *Nicholson* decision.

Most importantly, courts have refused to assess the content of the speech in question until the constitutional validity of the school regulations can be established. *Baughman v. Freicnmuth*, 478 F.2d 1345, 1347 (4th Cir. 1973); *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971). Student speech, whether inside or outside a public forum, can only be limited when appropriate due process is afforded. *Gambino v. Fairfax County School Board*, 429 F. Supp. at 737 (E.D. Va. 1977); *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975). As discussed in the next section, the guidelines of petitioner Bethel School District lack constitutional validity, and thus the extreme conditions prerequisite to censorship do not exist.

III. THE BETHEL SCHOOL DISTRICT GUIDELINES ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND THUS COULD NOT BE USED TO SILENCE A FORUM

Regulations in high schools limiting freedom of expression, if they are to exist at all, must meet certain minimal requirements. For official guidelines to be constitutionally sufficient, they must clearly set out what is forbidden; but other due process limitations also must be incorporated into any administrative regulations before they will be approved. The case law has developed minimal constitutional requirements before student publications can be censored, requirements equally appropriate for student speech in a public forum.¹

¹ The term "minimal" does not imply that it is easy to satisfy these standards; to date, guidelines challenged in court are overwhelmingly found violative of the required constitutional tests. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972); *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Hernandez v. Hanson*, 430 F. Supp. 1154 (D. Neb. 1977); *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977); *Pliscou v. Holtville Unified School District*, 411 F. Supp. 842 (S.D. Cal. 1976); *Cintron v. State Board of Education*, 384 F. Supp. 674 (D.P.R. 1974); *Jacobs v. Board of School Commissioners*, 349 F. Supp. 605 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); *Poxon v. Board of Education*, 341 F. Supp. 256

First, regulations must offer criteria and specific examples so that students will understand what expression is proscribed. *Nitzberg v. Parks*, 525 F.2d at 383 (4th Cir. 1975); *Baughman v. Freienmuth*, 478 F.2d at 1349 (4th Cir. 1973); *Shanley v. Northeast Independent School District*, 462 F.2d at 976 (5th Cir. 1972).

Second, the regulations must detail the criteria by which an administrator might reasonably predict the occurrence of "substantial disruption." *Nitzberg v. Parks*, 525 F.2d at 383 (4th Cir. 1975).

Third, the regulations must provide definitions of all key terms used, such as "obscenity," "disruption," "distribution" and "defamatory." *Hall v. Board of School Commissioners of Mobile County Alabama*, 681 F.2d 965, 971 (5th Cir. 1982); *Nitzberg v. Parks*, 525 F.2d at 383 (4th Cir. 1975); *Shanley v. Northeast Independent School District*, 462 F.2d at 977 (5th Cir. 1972).

(Continued from previous page)

(E.D. Cal. 1971). But see, *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980). Supreme Court decisions indicate that the Fourth Circuit applied a standard for vagueness in *Williams* that is much too strict. "The Court consistently has permitted 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975). "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP v. Button*, 371 U.S. 415, 432 (1963).

Finally, procedural due process requires that the regulations must be included in the official school publication or circulated to students in the same manner as other official material. *Nitzberg v. Parks*, 525 F.2d at 383 (4th Cir. 1975).

School rules which the courts have declared unconstitutionally vague or overbroad include a requirement that student publications conform to "the journalistic standards of accuracy, taste and decency maintained by the newspapers of general circulation in the city," *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977); a rule banning literature which is "alien to school purposes," *Cintron v. State Board of Education*, 384 F. Supp. 674 (D.P.R. 1974); a prohibition on literature which "advocates illegal actions, or is grossly insulting to any group or individual," *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); a ban on literature which "incites students or disrupts the orderly operation of the school," *Peterson v. Board of Education of School District No. 1*, 370 F. Supp. 1208 (D. Neb. 1973); a rule prohibiting literature that is "either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools or injuries to others," *Jacobs v. Board of School Commissioners*, 349 F. Supp. 605 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); a prohibition of "libelous" material without adequate definition, *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); a prohibition of "obscene" material without adequate definition, *Id.*; and a rule requiring the prior approval of all literature that is "political," "sectarian," or "of special interest," *Hall v. Board of*

School Commissioners of Mobile County, Alabama, 681 F.2d 965 (5th Cir. 1982).

Fraser was charged with violating the school's disruptive conduct rule, which states that "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." The regulation is clearly deficient, and cases cited by petitioners in urging wide discretion be granted schools to regulate discipline do not diminish the right to protected speech in public forums. Petition for Writ of Certiorari at 21. The regulation fails to define any of its key terms, such as "obscene," "profane" or "materially and substantially interferes," in ways which would give guidance to a high school student. No examples of what might be disruptive, obscene or profane are given. There are no criteria for an administrator to use in reaching a prediction that disruption has or will occur. And, as discussed in Section IV, *infra*, procedural requirements are virtually non-existent.

Further, as both the trial court and court of appeals concluded, the disruptive conduct rule is overbroad and on its face threatens constitutionally protected speech. The rule prohibits the use of "profane language," and the Ninth Circuit found that, read as a whole, it would "permit a student to be disciplined for using speech considered to be 'indecent' even when engaged in extra-curricular activity." *Fraser*, 755 F.2d at 1365 n.12. Petitioner agrees that the rule must be read to allow it to "regulate student speech deemed indecent." Petition for Writ of Certiorari at 14. None of the cases cited by petitioner, however, establish any authority for prohibiting "indecent" speech or equating such speech, regardless of

setting or circumstance, with "conduct which materially and substantially interferes with the educational process." *Tinker*, 393 U.S. at 509.

In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973), this Court specifically declined to allow the regulation of student speech based upon offensiveness or "conventions of decency," 410 U.S. at 670, and found that a student publication that contained profanity but that was not obscene was constitutionally protected speech. Since *Papish*, several lower courts have found that non-obscene speech made by high school students which contains profanity or sexual references is similarly protected and cannot be automatically presumed disruptive. *Jacobs v. Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated per curiam*, 420 U.S. 128 (1975); *Scoville v. Board of Education of Joilet*, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970); *Koppell v. Levine*, 347 F. Supp. 456 (E.D.N.Y. 1972). As the court noted in *Jacobs*, an audience of high school students does not preclude the protection of speech which may be "far from obscene in the legal sense" and not demonstrably disruptive. 490 F.2d at 610.

These cases suggest that even student speech containing profanity merits protection and cannot be prohibited under all circumstances simply because it is distasteful to school administrators. As this Court noted in *Cohen v. California*, 403 U.S. 15, 26 (1971), the use of profane words, while not necessarily adding to the cognitive component of expression, may enhance the communication of the emotions that give the expression force.

Even assuming arguendo, however, that profanity used by high school students could be the subject of a total prohibition by school administrators, it is evident that the Bethel disruptive conduct rule goes well beyond prohibiting its use. The rule applies to "indecent" speech regardless of whether such speech contains profanity or is obscene. Even the principal case upon which petitioners rely in support of their discretionary authority to insulate the students under their protection from contact with offensive speech does not sanction so broad an encroachment on First Amendment rights. In *FCC v. Pacifica*, 438 U.S. 726 (1978), this Court upheld as constitutional a Federal Communications Commission order finding that a radio broadcast, which made repeated use of profanity in a patently offensive way designed to shock the listener, fell within the F.C.C.'s power to regulate "indecent" speech and could be "channeled" to air at times when unsupervised children would not hear it. Among the many reasons that petitioners' reliance on *Pacifica* is inapposite is the fact that the indecent speech there in question was explicitly profane, not merely capable of an "indecent" or sexually suggestive interpretation as was Fraser's speech. *Pacifica* involved inadvertent listeners, not high school students voluntarily choosing to attend a student assembly from which they could leave at their will. Finally, *Pacifica* only dealt with the highly regulated broadcast media, not a forum for expression of a student speech assembly. This Court there took care to emphasize the narrowness of its *Pacifica* holding and the fact that it did not contemplate sanctions for telecasts "of an Elizabethan comedy" or Chaucer's *Miller's Tale*. 438 U.S. at 750, n.29. Like some of the more ribald passages in works such as these, the speech that Bethel School district found

indecent and violative of its rules in the instant case was essentially an attempt to use a sexual metaphor in order to more effectively convey an idea. The rule prohibiting the use of such metaphor is overbroad; no case ever has permitted such a level of outright censorship.

Because the Bethel School District guidelines fail to comport with the most minimal of constitutional requirements, they were found inoperable by the district court and the court of appeals. Guidelines which fail to meet the constitutional requirements may not be used as the basis for restricting student speech in a public forum. For this reason, the decision below should be upheld.

IV. THE APPLICATION OF THE BETHEL SCHOOL DISTRICT POLICY WAS UNCONSTITUTIONAL

A. No Material and Substantial Disruption of the School Environment Resulted from Fraser's Speech

As this Court has determined, the special circumstances of the school environment allow school officials to censor student speech when they can reasonably demonstrate or forecast a "material and substantial" disruption of school activity. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). No such disruption was reasonably predicted by Bethel High School officials and no such disruption in fact occurred as a result of Fraser's speech.

Censors basing their acts upon the substantial disruption theory must "be able to show that

[their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The school authority's action cannot be the result of an "undifferentiated fear" of a disruption. *Id.* at 508. Courts have said that neither a "mild curiosity" by students nor an administrator's belief that a particular expression "could" or "might" cause a disruption is sufficient, *Vail v. Board of Education*, 354 F. Supp. 592 (D.N.H.), *vacated and remanded*, 502 F.2d 1159 (1st Cir. 1973), and a school official's "intuition" is not enough. *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). In short, to justify suppression of student expression, an administrator needs demonstrable facts. To meet the substantial disruption standard, far more is required than petitioners allege occurred in the instant case.

Petitioners presented evidence that some students reacted by "hooting and yelling" during Fraser's speech. RT at 37; *Fraser*, 755 F.2d at 1359. However, a school counselor testified that the noises he heard were similar to those heard at other assemblies held at the school. RT at 37; *Fraser*, 755 F.2d at 1359.

The counselor also testified that three students out of the approximately 600 present made motions simulating sexual activity during the speech. RT at 37; *Fraser*, 755 F.2d at 1359. Yet as the court of appeals noted, the school officials made no claim that they had difficulty maintaining order during the assembly or that Fraser's speech delayed the assembly or the school day. *Fraser*, 755 F.2d at 1360. School officials in fact took no action to discipline the three students directly involved in the activity to which the

officials objected. See *Sullivan v. Houston Independent School District (Sullivan I)*, 307 F. Supp. 1328, 1342 (S.D. Tex. 1969).

The district court found that on the day after the assembly one teacher decided that students in her class were "more interested in discussing the speech than attending to class work." The teacher then "invited a class discussion of the speech," which lasted 10 minutes. Finding of Fact #5 (emphasis added). No evidence indicated that any material and substantial disruption of the class occurred. Evidence of an invited discussion on a topic in which students expressed an interest can hardly be claimed as "establishment of substantial fact, to buttress the determination" of substantial disruption. *Butts v. Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971). Repeated disruptions of class lectures by students who wanted to discuss the student expression that administrators had condemned has been seen as not satisfying the *Tinker* standard. *Sullivan v. Houston Independent School District (Sullivan I)*, 307 F. Supp. at 1334, 1342 (S.D. Tex. 1969). None of petitioners' evidence suggests that Fraser's speech materially disrupted classwork or involved substantial disorder or invaded the rights of others as *Tinker* requires. 393 U.S. at 513.

Not only has the school failed to present evidence of disruption in fact, but its assertion that "inappropriate" language in itself can be disruptive is clearly contradicted. In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670 n.6 (1973), this Court found no disruption inherent in the use of the words "Motherfucker Acquitted" in a college newspaper. Similarly in *Antonelli v. Hammond*, 308 F. Supp. 1329, 1336 (D. Mass. 1970), the court

recognized that the use of four-letter words in a campus newspaper "is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process." Even in the high school environment, the use of "coarse language" has been recognized as creating "little, if any, disruption of normal school activities -- let alone the 'material and substantial' disruption" required by *Tinker*. *Sullivan v. Houston Independent School District (Sullivan II)*, 475 F.2d 1071, 1075 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973). The mild words used by Fraser do not even approach the level of unconventionality of language that has been found non-disruptive in other cases.

Neither can the school establish that the *Tinker* standard was met by the alleged "sexually harassing" nature of Fraser's speech. RT 94-100. The testimony of one witness that the speech was sexist does not satisfy the requirement that the expression be of a kind that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. A blanket conclusion that sexually oriented speech is inherently disruptive of the school environment can no more pass constitutional muster than could a similar claim regarding racially offensive material. See *Leibner v. Sharbaugh*, 429 F. Supp. 744, 749 (E.D. Va. 1977).

In *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), which petitioners cite as relevant, the court relied on the expert testimony of four witnesses who asserted that "significant psychological harm" would result from students being questioned about intimate details of their sexuality. The facts in this case are clearly distinguishable. Fraser's speech satisfies no claim of "sig-

nificant psychological harm" and involves no intrusive questioning about students' personal lives.

The evidence indicates that the school officials' decision to punish Fraser was clearly based not on any acceptable grounds, but on precisely the desire to avoid "discomfort and unpleasantness." *Tinker*, 393 U.S. at 509. The punishment was their effort to condemn and suppress "expressions of feelings with which they do not wish to contend." *Id.* at 511 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

As with *Tinker*, where the school authorities indicated that their objection was not so much to the expression of the students itself but rather to their decision to express themselves by wearing black arm-bands to school instead of making their protest through the ballot box, Fraser was punished as much for the form of his message as for the content. *Tinker*, 393 U.S. at 509 n.3. Clearly the message of political expression and the means for expressing that message are often so integrally tied as to be inseparable. Fraser perhaps could have made a speech that avoided the use of sexual puns, but the reaction of the audience and the success of his candidate is at least some indication that Fraser's choice of words was an especially effective method of achieving the political goal he sought. Attempted control of the words and connotations used in delivery of otherwise protected expression is no less censorship than outright banning of the message behind those words and connotations.

In sum, petitioners presented no evidence that the *Tinker* standard has been met.

B. Fraser's Speech Was Not Obscene

Although the petitioners' disruptive conduct rule refers to "obscene language," the petitioners' do not contend that Fraser's speech in this case was obscene within the meaning of the decisions of this Court, and, as discussed in Section III, *supra*, the clause of the rule banning profanity is unconstitutional on its face. The proper test for obscenity in the high school context is developed by this Court's decisions in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968). *Miller* limits the scope of the obscenity exception to works "which depict or describe sexual conduct" and "which taken as a whole appeal to the prurient interest in sex, which portray, sexual conduct in a patently offensive way and which taken as a whole, do not have serious literary, artistic, political or scientific value." 413 U.S. at 24. *Ginsberg* applies a variable obscenity concept designed to respect the differences in maturity between adults and minors while still retaining the distinction between speech designed to appeal to the prurient interest and speech not so designed. *Id.* at 635-37. Fraser's speech in the instant case was designed primarily not to titilate but rather to focus attention on his chosen candidate in the student election. Finding of Fact No. 4. The sexual metaphors he employed for the sake of humor were not significantly erotic and do not fulfill the *Miller* definition of obscenity.

Fraser's speech, therefore, provides no constitutional basis for restraint.

C. Fraser's Suspension Constituted a Violation of His Right to Due Process and Equal Protection of the Law As Guaranteed by the Fourteenth Amendment

Immediately after petitioner Assistant Principal Ingle announced Fraser's punishment, Fraser indicated that he wished to appeal her decision. Because the principal was not present at Bethel High School that day, Ingle stated that she would rule on the immediate appeal. Ingle promptly denied the appeal. Complaint at para. 24.

As this Court has recognized, "[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." *Goss v. Lopez*, 419 U.S. 565, 576 (1975). When the fundamental right to free expression is at issue, an appeal procedure may not be a sham. Ingle's imposition of punishment and immediate denial of a first level appeal was a clear violation of Fraser's due process rights.

In addition, the punishment of Fraser for his speech when other students expressing similar messages had gone unpunished is a clear violation of his right to equal protection under the law. Only one year earlier, another student gave a speech with secondary meanings of a sexual nature and received no suspension. RT at 52; Complaint at para. 23. Yet another student had published an essay in a school publication that described the sexual conquest of a female by a male in terms of a military action and

received no punishment. Complaint at para. 22. Also, the three students who were seen during Fraser's speech making movements simulating masturbation and sexual intercourse were neither reprimanded nor suspended.

The clear implication is that Fraser alone was singled out for punishment because of his history as an outspoken critic of the school and its administration through oral comments and editorials in the student newspaper. Complaint at paras. 16 and 18. Such unequal enforcement of a rule by a state actor cannot be tolerated. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

CONCLUSION

As this Court stated in *Tinker*:

Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

For the foregoing reasons, the judgment of the court below should be upheld.

Respectfully Submitted,

J. MARC ABRAMS
Counsel of Record
Attorney for Amici Curiae
300 Park Avenue
New York, New York 10022

Of Counsel:

S. MARK GOODMAN
Student Press Law Center
800 18th St., N.W.,
Washington, D.C. 20003
202-466-5242

(11)
No. 84-1667

Supreme Court, U.S.
FILED

JAN 13 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, *et al.*,
Petitioners

v.

MATTHEW FRASER, *et al.*,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE *AMICI CURIAE*
AMERICAN BOOKSELLERS ASSOCIATION
MICHAEL SHECK FOUNDATION
IN SUPPORT OF THE RESPONDENTS

RONALD COLES *
27 Main Street
Ogunquit, Maine

MICHAEL SHECK FOUNDATION
1325 15th Street, N.W.
Washington, D.C.

Attorney for the Amici Curiae

* Counsel of Record

Dated: January 13, 1986

QUESTIONS PRESENTED

1. Is non-obscene, non-disruptive public school student speech protected by the First Amendment?
2. Is the Bethel School District's disruptive conduct rule unconstitutional on its face?



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
Part I	4
Part II	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975)	9
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	7
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	4
<i>Cohen v. California</i> , 405 U.S. 15 (1971)	7, 9
<i>Cornelius v. NAACP Education and Legal Defense Fund, Inc.</i> , — U.S. — (1985), 105 S.Ct. 3439 (1985)	8
<i>East Hartford Education Association v. Board of Education</i> , 562 F.2d 838 (2d Cir. 1977)	5
<i>F.C.C. v. Pacifica Foundation</i> , 483 U.S. 726 (1978)	7
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975)	4, 8
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1976)	8
<i>Keyshian v. Board of Regents</i> , 385 U.S. 589 (1967)	4
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	4
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415 (1963)	9
<i>New Jersey v. T.L.O.</i> , 469 U.S. —, 105 S.Ct. 733 (1985)	8
<i>Pappish v. University of Missouri Curators</i> , 411 U.S. 667 (1973)	8
<i>Powers v. Mancos School District & RE 6</i> , 539 F.2d 38 (10th Cir. 1976)	6
<i>Pratt v. Independent School</i> , 670 F.2d 771 (8th Cir. 1982)	5
<i>Seyfried v. Walton</i> , 668 F.2d 214 (3rd Cir. 1981) ..	5
<i>Sheck v. Baileyville School Committee</i> , 530 F.Supp. 679 (DC Me. 1982)	7
<i>Thomas v. Granville Board of Education</i> , 607 F.2d 1043 (2d Cir. 1979)	7, 9
<i>Tinker v. Des Moines Independent School District</i> , 393 U.S. 503 (1969)	4
<i>United States Commissioner of Customs v. One Book Called Ulysses</i> , — F.Supp. —	10
<i>West Virginia State Board of Education v. Bar- nette</i> , 319 U.S. 624 (1943)	8
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	4

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
Joyce, James, <i>Ulysses</i>	10
Pyles, Thomas, <i>The Origins and Development of the English Language</i> (Harcourt, Brace, Javoni- vich: New York, 1971)	11



IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1667

BETHEL SCHOOL DISTRICT No. 403, *et al.*,
Petitioners

v.

MATTHEW FRASER, *et al.*,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF THE *AMICI CURIAE*
AMERICAN BOOKSELLERS ASSOCIATION
MICHAEL SHECK FOUNDATION
IN SUPPORT OF THE RESPONDENTS**

INTEREST OF THE AMICI *

1. The American Booksellers Association is a national organization comprising 4,500 members which include 6,000 individual bookstores. The ABA was organized in 1909. Presently, their members account for eighty percent of all booksales of general interest by bookstores. For many years the ABA has closely watched First Amendment cases and feels the instant case is of great import.

2. The Michael R. Sheck Foundation is an organization committed to the freedoms of expression and re-

* Letters of Consent have been filed from both parties.

ligion. The Foundation grants monies to assist in this effort and feels the First Amendment may be severely impinged.

STATEMENT

Amici accept the Statement of the Case made by Respondents in their brief opposing certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents questions which sharply implicate the First Amendment rights of public high school students. The case is further confounded in that courts have granted wide latitude to school administrators in determining educational standards. Essentially, the Court is faced with defining the scope of the First Amendment; an amendment on which many of our individual freedoms are based.

The instant case comes to the Court on a Writ of Certiorari to the Ninth Circuit Court of Appeals. Respondent in this case brought an action against Petitioners in U.S. District Court alleging violations of 42 U.S.C. § 1983, the First Amendment, and the Fourteenth Amendment. The District Court held for Respondent awarding \$278 in damages and \$12,500 in attorney's fees and costs. The Ninth Circuit Court of Appeals affirmed the decision below.

In short, the case involves Matthew Fraser's speech before a student political assembly. In his speech, before a voluntary student assembly, Respondent spoke endorsing a candidate for office in the Associated Student Body. The record below clearly indicates that Respondent used sexual innuendo as a rhetorical device.¹ There is no evidence that the speech was obscene or "pervasively vulgar." As a matter of fact, Petitioners have made

¹ To believe that no student could have at least considered the possibility of such vigorous rhetoric is to wholly misunderstand the adolescent mind.

an admission that the speech was *not* obscene. The record further indicates that during Respondent's speech two students simulated sexual activity, one student simulated masturbation, and several students made boisterous noises. There is also an indication that the day following Respondent's speech one Home Economics class teacher allowed ten minutes of class time for discussion of the issue.

From the record in this case, which no part of is disputed by Petitioners it becomes immediately clear that the subsequent action of Petitioners is violative of Respondent's constitutional guarantees. (The Petitioner school board suspended Respondent for three days and removed his name from consideration as a graduation speaker.) There is not one scintilla of evidence on the record to indicate that the educational process was "materially" or "substantially" disrupted.

In Part I, *infra*, we will demonstrate that the Respondent's speech is protected on First Amendment grounds. While we understand that school authorities must be given wide latitude in maintaining school order, we do not believe they have the right nor the need to regulate non-obscene, non-disruptive student speech.

In Part II, *infra*, we will show that the Bethel School District Disruptive Conduct Rule is unconstitutionally vague. Further, in Part II, we will discuss the inherent dangers involved in a decision in favor of Petitioners.

Amici pray that this Court carefully consider the basic First Amendment rights implicated in the instant case and the concomitant havoc to be evoked if we deny them to our school children. If we make a mockery of the essential liberties, we should neither expect nor deserve our children's respect.

ARGUMENT

I. STUDENT SPEECH IS PROTECTED ABSENT A SHOWING OF OBSCENITY OR "MATERIAL" AND "SUBSTANTIAL" DISRUPTION OF THE EDUCATIONAL ENVIRONMENT.

"The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). "[E]ducation is perhaps one of the most important functions of state and local government. . . ." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "[E]ducation prepares individuals to be self-reliant, self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). ". . . [C]ourts are not school boards of legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Wisconsin v. Yoder*, *supra*, at 234-235. "The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

While recognizing the special nature of the school environment, this Court has made clear that students do not "shed their constitutional rights to free speech or expression at the school-house gates." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). Nor will this Court "tolerate laws which cast a pall of orthodoxy over" the school. *Keyshian v. Board of Regents*, 385 U.S. 589, 603 (1967). The "classroom is peculiarly the 'marketplace of ideas'." *Keyshian*, *supra*, at 603. If the necessarily restrictive environment of the classroom is a "marketplace of ideas" then is not a student assembly designed for rigorous student political inquiry even a larger "marketplace"?

Petitioners seem to be of the specious notion that school boards are exempt from the operation of the First

Amendment. See, *Seyfried v. Walton*, 512 F.Supp. 235, 238 (DC Md. 1981), *aff'd*, 668 F.2d 214 (3rd Cir. 1981), and *Pratt v. Independent School*, 670 F.2d 771 (8th Cir. 1982). Petitioners also assert that school boards may practice "indoctrination" of students virtually without restraint. This, simply is dangerous.

The evil to be avoided is the ideological indoctrination which would result from attempting to attain the laudable goal of instilling our youth with a set of moral values by barring their exposure to ideas inconsistent with those values.

Seyfried v. Walton, *supra*, at 220.

In *East Hartford Education Association v. Board of Education*, 562 F.2d 838, 846 (2d Cir. 1977), in which a teacher challenged the constitutionality of a dress code, the Second Circuit held:

Certainly a school board may make regulations that help promote the effective and efficient education of children. It may not, however, make regulations that infringe on constitutional interests while not realistically and significantly furthering the board's proper purposes.

The regulation at issue here implicates both a Fourteenth Amendment liberty interest and a First Amendment interest. The intersection of these two interests calls for a higher degree of scrutiny of the government's countervailing interest than would be the presence of either individual interest alone. See, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98-99, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (equal protection analysis-higher level of scrutiny required because both First and Fourteenth Amendment interests involved). See also *Gunther*, *supra*, 86 Harv. L.Rev. at 7 ("responsible 'balancing'" requires careful identification and separate evaluation of "each analytically distinct ingredient of the contending interests"). Thus we cannot "accept unquestioningly the school authorities' judgment as to the effects of

classroom conduct or speech," *James v. Board of Education*, 461 F.2d 566, 575 n.22 (2d Cir.) cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 491 (1972), but rather must require a regulation of the sort at issue here to be "drawn as narrowly as possible to achieve the social interests that justify it" and to be "reasonably related to the needs of the educational process," *id.* at 574. At this stage of the proceedings, the Board has plainly failed to carry this burden, and its asserted interest are far outweighed by the individual interests at stake.

Surely, the First and Fourteenth Amendment considerations in any attempt to regulate speech calls for the most stringent scrutiny by the Court. School boards, should, and must, implement the day-to-day policies of education, but should not have free reign to censor student speech. Transient personal, religious or moral values of individual school board members should not wreak ideological havoc on the ultimate recipients of education, the students. A proper education presupposes freedom of choice, not ideological mind control; intellectual freedom versus ignorance.

Defendants would have this Court accept the notion that a school board's *objective* standards should always prevail in determining community values to be implanted upon its *secor.dary* school students. We, however, submit that *subjective* standards are more appropriate. See, *Powers v. Mancos School District & RE 6*, 539 F.2d 38 (10th Cir. 1976).

This Court has held that while school boards do not have absolute discretion to ban library books based upon *idea content*, a judicial inquiry as to the school board's *motivation* behind a book ban is proper. We assert that is the case with student speech as well. Justice Brennan suggests that no unconstitutional motivation would be present if a book were removed upon a showing that the book was "pervasively vulgar." Without citing prior

U.S. Supreme Court decisions dealing with obscenity standards, the majority opinion suggests that the "pervasively vulgar" standard is now applicable to book review for secondary school libraries. No definition of vulgarity is given. *Board of Education v. Pico*, 457 U.S. 853 (1982).

Amici submit that, even under the most stringent application of what constitutes "pervasively vulgar", Respondent's speech fails to come within that categorization.

School authorities can regulate indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children. . . . [B]ut school officials are not the final arbiters of their authority, nor do they have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the rigorous from the vulgar."

Thomas v. Granville Board of Education, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

Petitioners rely upon the fact that they did not intend to suppress ideas in the instant case. But is it not words which convey ideas? How anomalous and dangerous then to *presume* their action was protected because they did not *intend* to suppress ideas. "Courts must remain on the First Amendment alert . . . even those ostensibly based on vocabular considerations. A less vigilant rule would leave the care of the flock to the fox that is only after their feathers." *Sheck v. Baileyville School Committee*, 530 F.Supp. 679, 688 (DC Me 1982).

Petitioner's reliance on the doctrine established in *F.C.C. v. Pacifica Foundation*, 483 U.S. 726 (1978) is clearly inapposite. This Court has clearly made a distinction between the sanctuary of the home and the forum which exists in a public place. *Cohen v. California*, 405

U.S. 15 (1971). Courts must remain particularly diligent in scrutinizing governmental intervention into expression which is based upon content, as opposed to its time, place, or manner. *See, Pappish v. University of Missouri Curators*, 411 U.S. 667 (1973). Petitioners have no basis for censoring non-obscene speech when the speech's content was consistent with the nature of the forum the school board established. *Cornelius v. N.A.A.C.P. Education and Legal Defense Fund, Inc.*, — U.S. —, 105 S.Ct. 3439 (1985).

Thus, it is clear that on First Amendment grounds Respondent's speech is protected.

II. PETITIONER SCHOOL BOARD'S DISRUPTIVE CONDUCT RULE IS UNCONSTITUTIONALLY VAGUE.

The Ninth Circuit affirmed the District Court's ruling that the Bethel School District's Disruptive Conduct Rule was "unconstitutionally vague, uncertain, and indefinite." The District Court also ruled it to be "substantially overbroad" as it was "so drawn as to sweep within its ambit protected speech or expressions of other persons not before this Court." PA at BS. It is true that the unique demands of the educational process allow greater flexibility in student disciplinary matters. *Goss v. Lopez*, *supra*; *New Jersey v. T.L.O.*, 469 U.S. —, 105 S.Ct. 733 (1985); *Ingraham v. Wright*, 430 U.S. 651 (1976), however, Petitioners seriously misapprehended the nature of *New Jersey v. T.L.O.*, *supra*, when relying upon it for the Court made clear that it was not applicable to student expression cases.

"[S]chool boards have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Petitioners state in their brief, at 33, that "the disruptive conduct rule as applied to Fraser was not unconstitutionally vague." While that may be a point for philosophical discussion, and inapplicable for Fraser's speech was protected, it is not incumbent upon the Court to even consider it for:

the Court consistently has permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

Bigelow v. Virginia, 421 U.S. 809, 815-16 (1975).

For in appraising a statute's inhibitory effect upon [First Amendment] rights this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

NAACP v. Button, 371 U.S. 415, 432 (1963).

In schools, as in other "special settings," the state must make clear the classes and methods of expression which it deems irreconcilable with the specific institutional setting. *Cohen v. California*, 403 U.S. 15, 19 (1971); *Thomas v. Granville Board of Education*, *supra*, 607 F.2d at 1049 and n.10. "Because First Amendment freedoms need breathing space to survive, government may regulate in the arena only with narrow specificity." *NAACP v. Burton*, *supra*, at 433. It is undeniably clear that the Bethel School District's disruptive conduct rule fails to give any clear indication of the proscribed behavior or the ramifications of such behavior.

While the record indicates that Fraser's speech was his own original creation, let us, *arguendo*, assume he read the following:

I'm sure that by the clock like some kind of infant
I had at me they want everything in their mouth all

pleasure those men get out of women I can feel his mouth O Lord I must stretch myself I wished he were here or somebody to let myself go with or come again like I feel all fire inside of me or if I could dream when he made me spend ten second time tickling me behind with his finger with my legs around him I had to hug after O Lord I wanted to shout all sorts of things Fuck or shit or anything at all.²

This clearly contains vulgarity and sexual innuendo. Had he removed the four letter oaths and retained the innuendo could he then have been punished?³ If so the school board would have attacked *Ulysses*, a protected book since 1933. *U.S. Commissioner of Customs v. One Book Called Ulysses*, — F.Supp. — (1933).

What if someone made a remark, quite innocently, that was perceived to connote sexual activity, could they be punished? Words are not stagnate; there is inevitable semantic change.

It is a great pity that language cannot be that exact, finally tuned instrument that deep thinkers wish it would be. But the facts are, that the meaning of every word is susceptible to change of one sort or another, and some words have so many individual meanings that we cannot really hope to be absolutely certain of the sum of these meanings But it is probably quite safe to say that members of the human race . . . will go on making absurd noises with their mouths at one another in what idealists will always consider to be a deplorably inadequate and sloppy manner, and yet manage to understand one another well enough for their own purposes.

² Joyce, James, *Ulysses*.

³ If the Court is to hold non-obscene sexual innuendo to be unprotected, it is possible that library shelves would be devoid of such seminal works as *Phaedrus*, *Canterbury Tales*, *Romeo and Juliet*, and *On Interpretation of Dreams*. This Court must clearly be cautious in allowing attacks on intellectual freedom.

. . . And most of the manifold phenomena of life—hatred, disease, famine, birth, death, sex, war, atoms, isms, just to name a few—would remain as messy and hence as unsatisfactory to those unwilling to accept them as they always have been, no matter what words we use to refer to them. *See, Pyles, Thomas, The Origins and Development of the English Language*, (Harcourt, Brace, Javonovich: New York, 1971.)

The school board cannot use their indefinite rule to censor free speech. By their prudish standards modern fiction would fall to the wayside.⁴ Their rule is clearly inadequate for it fails to specify what is proscribed. For school administrators to declare by edict what may not be preferable language to be indecent simply is impractical and cannot pass constitutional muster.

CONCLUSION

For the aforementioned reasons the Court should affirm the judgment of the Courts below without modification.

Respectfully submitted,

RONALD COLES *
27 Main Street
Ogonquit, Maine

MICHAEL SHECK FOUNDATION
1325 15th Street, N.W.
Washington, D.C.

Attorney for the Amici Curiae

* Counsel of Record

Dated: January 13, 1986

⁴ Cf. n.3, *infra*.

JAN 13 1986

No. 84-1667

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; et al.,
Petitioners,

v.

MATTHEW N. FRASER, a Minor; et al.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF
THE FREEDOM TO READ FOUNDATION**

JAMES A. KLENK
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:

MARK SABLEMAN

Attorneys for Amicus Curiae
The Freedom to Read Foundation

CHAS. P. YOUNG CHICAGO

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
I. THE <i>TINKER</i> TEST IS THE PROPER ONE FOR JUDGING FREE SPEECH CLAIMS IN SCHOOLS.....	3
II. FRASER SHOULD NOT BE PUNISHED FOR A POLITICAL SPEECH THAT USED IMAGERY TAUGHT IN THE CLASSROOM	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982)	2, 6
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983)	10
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	8
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	2
<i>Hynes v. Mayor of Oradell</i> , 425 U.S. 610 (1976)	10
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	7
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	3
<i>Minarcini v. Strongsville City School District</i> , 541 F.2d 577 (6th Cir. 1976)	2
<i>Police Department of Chicago v. Mosley</i> , 408 U.S. 92 (1972)	10
<i>Tinker v. Des Moines Independent Community School Dis-</i> <i>trict</i> , 393 U.S. 503 (1969)	2, 3, 4, 5, 10
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	3, 10

Other Authorities

P. E. Boller, Jr. <i>Presidential Campaigns</i> , 149 (1984)	9
Hansen, "Shakespeare, Sex . . . and Dr. Bowdler," <i>Saturday Review</i> , April 23, 1955	7
E. Partridge, <i>Shakespeare's Bawdy</i> (1948)	8
W. Shakespeare, <i>The Comedy of Errors</i>	8
W. Shakespeare, <i>Cymbeline</i>	8
W. Shakespeare, <i>King Lear</i>	8
W. Shakespeare, <i>Macbeth</i>	8
W. Shakespeare, <i>Pericles</i>	8
W. Shakespeare, <i>Much Ado About Nothing</i>	8
W. Whitman, <i>Leaves Of Grass</i> (J. Kouwenhoven ed. 1950)	9

No. 84-1667

In The

Supreme Court of the United States

October Term, 1985

BETHEL SCHOOL DISTRICT NO. 403; et al.,
Petitioners,

v. \

MATTHEW N. FRASER, a Minor; et al.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF
THE FREEDOM TO READ FOUNDATION**

The Freedom To Read Foundation respectfully submits this brief *amicus curiae*. All parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

INTEREST OF AMICUS

The Freedom To Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and

defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

The Freedom To Read Foundation is deeply committed to fostering education and free expression. The Foundation believes that First Amendment freedoms can be effective only if they are nurtured in our Nation's youth. First Amendment freedoms are most relevant to high school students, the Foundation believes, because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968). Our public schools are where education in democracy begins. To this end, the Foundation has participated as *amicus curiae* in other cases before this Court where the First Amendment rights of students were at issue, including *Board of Education v. Pico*, 457 U.S. 853 (1982).

Pico protected the integrity of the school library. But a library is no more than a collection of books and information built on words. If non-obscene words at a school-sponsored election rally can be suppressed, there is a grave danger that school officials will take this as a license to purge library collections of books containing words deemed "indecent" or "inappropriate," emasculating the library as "a mighty resource in the free marketplace of ideas." *Minarcini v. Strongsville City School District*, 541 F.2d 577, 582 (6th Cir. 1976).

SUMMARY OF ARGUMENT

We will not repeat the arguments of the parties. Instead, we write to make two points. First, we will briefly demonstrate why censorship based on notions of "civility" and "decent behavior" has no place in our system of ordered liberty and urge that this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503

(1969) strikes the proper balance to decide cases like this. Second, we will show that Fraser's use of sexual imagery is no different than speech and literature frequently taught in the classroom.

ARGUMENT

I. THE *TINKER* TEST IS THE PROPER ONE FOR JUDGING FREE SPEECH CLAIMS IN SCHOOLS.

Since *Meyer v. Nebraska*, 262 U.S. 390 (1923) there has been no question that the Constitution protects the rights of public school students. Justice Jackson eloquently set forth the reasons for this in *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 637 (1943):

That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Applying these and other settled First Amendment principles, the Court reaffirmed that students do not leave their First Amendment rights at the schoolhouse door in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

Tinker struck a balance between the First Amendment rights of students and the state's interest in controlling the educational mission of our public schools. The school district there, like Bethel School District here, sought judicial deference to its judgment regarding punishment of student speech. But this Court recognized that such an approach would effectively give school officials "absolute authority over their students" and make it impossible for students to assert their constitutional rights. *Id.* at 511. This Court instead applied a traditional First Amendment test and held that a student's First Amendment rights can only be limited if his speech or conduct "materially disrupts classwork or

involves substantial disorder or invasion of the rights of others." *Id.* at 508.

Tinker is sound constitutional policy because it provides a clear standard to judge student behavior. Under *Tinker* school officials are free of constitutional constraint in dealing with any of the following:

- Conduct that causes physical disturbance or disorder.
- Conduct that materially disrupts classwork, including disrespect to teachers or administrators.
- Conduct that harms other students.

Hence, *Tinker* does not hamper school officials in administering the school effectively.

This case illustrates the appropriateness of the *Tinker* analytical framework. Fraser's speech in no way interfered with Bethel High School's educational mission, and hence should not be abridged.* Fraser's speech caused no physical disturbance or disorder that materially disrupted academics. No classes were cancelled, delayed or disrupted. No student was harmed. The only evidence offered of "disruption"—a few gestures in the audience and a ten-minute discussion in one class (Jt. App. 42-43)—was minor and clearly had no

* Following is the entire text of Fraser's nominating speech:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.

substantial effect on classwork. Nor did the speech display disrespect for school authorities that might interfere with school discipline. The speech made no references to school authorities, other than to urge a vote in the student council election for a student who would vigorously assert student interests—hardly an illegitimate message in a student political rally. Under these circumstances, there is no reason why such otherwise constitutionally protected speech should subject Fraser to punishment by the school.

In contrast to *Tinker's* clear rule, Petitioner school district and the United States in this case urge a vacuous standard that provides no basis for principled constitutional adjudication. They would allow the school district to justify its action on the basis of “inculcating proper values” and “standards of decency” in students, and establishing “an atmosphere of civility” in the school. (Pet. Brief at 17-21; Brief of United States at 13-21.)

But any official action can be justified in the name of “proper values,” “decency” and “civility.” Such words are favorites used by dictators and totalitarian rulers seeking easy justification for unjustifiable acts. No student expression, save perhaps those associated with well-recognized political views, would be safe under such a test.

A standard that allowed such vague justifications of school action could allow a school to become a miniature totalitarian state, beyond judicial review or constitutional restraint. Student speech could be confined only to “expression of those sentiments that are officially approved.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969). School newspapers could be restricted to printing the school administration’s viewpoint, and no others. School assemblies could become pep rallies for the official school line, no matter what issue or topic was being addressed. This would not happen in every school, but abandonment of the *Tinker* rule would allow such excesses to go unchecked when they occurred.

Moreover, our Nation's school districts are decentralized, based in local communities and responsive to the needs and desires of those communities. This is a strength, fostering local responsiveness and national diversity. But, it also creates dangers to freedoms of those who are part of ethnic, racial, religious or cultural minorities in the school district. Smaller school districts could become dominated by one or another faction, and could seek to make the "proper values" being taught in the schools that of their own dominant group. Minority students who spoke out could find their views suppressed, and in such cases the actions of suppression could be beyond constitutional review if done in the name of "inculcating values" and maintaining an "atmosphere of civility."

Elevating "proper values" and "civility" to the standard for constitutional adjudication may also endanger school libraries, giving school districts the freedom to slant their collections in favor of their version of "proper values" and "civility." Libraries have been the "principal locus" of the freedom of students to inquire and expand their studies and understanding. *Board of Education v. Pico*, 457 U.S. 853, 868-69 (1982). But allowing school districts to suppress whatever they consider "indecent," "uncivil," or containing "improper values" could transform libraries instead into the locus of the party line. It is not beyond imagination for a school district to exclude all major literature of certain minority Americans, to the end of promoting the "proper values" of the school board majority. While such action would undoubtedly promote those values, it would also deliver a fatal blow to another, more predominant value—the value of the freedoms of our Bill of Rights, on which our Nation is based.

That school texts and library collections could be censored and sanitized in the name of "civility" and "decency" is not a conjured horrible. Dr. Thomas Bowdler, the Eighteenth Century censor, did just that to some of the greatest texts of the English language, including Shakespeare's works and

Gibbons' *Decline and Fall of the Roman Empire*. Bowdler blue-penciled Shakespeare to suppress every hint of the Bard's creativity with respect to the sexual aspect of human existence. Hansen, "Shakespeare, Sex ... and Dr. Bowdler," *Saturday Review*, April 23, 1955 at p. 7. Such a line-by-line "bowdlerizing" left an antiseptic Shakespeare, less creative and less worth reading. As one contemporary critic of Bowdler noted: "Shakespeare is, of all poets, precisely that one of whom we can least afford to lose one iota ..." *Id.* at p. 8. But allowing speech in schools to be regulated on a vague "decency" and "civility" standard would permit just such misguided and moralistic censorship, which is totally repugnant to our constitutional freedoms.

Finally, one must ask what educational lessons would be taught in a school run by officials who are protected by judicial deference to their own notions of "decency" and "civility." Would students learn the values of democracy, free inquiry and free expression? Or would they learn the cynical lessons of authoritarianism and of orthodoxy imposed from above? This Court has concluded in the past that our schools must not merely educate youth, but must educate them for life in a free, open, and democratic society:

[T]he First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom. ... The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

This settled principle and the rule of *Tinker* should be reaffirmed, so that the proper balance is maintained between student First Amendment rights and the needs of the educational process. The judgment of both the trial court and the court of appeals should be affirmed.

II. FRASER SHOULD NOT BE PUNISHED FOR A POLITICAL SPEECH THAT USED IMAGERY TAUGHT IN THE CLASSROOM.

Matthew Fraser's nominating speech is protected by the First Amendment. A speech that contains "scurrilous" four-letter words attacking government authority in the most disrespectful terms is protected outside the schoolhouse. *Cohen v. California*, 403 U.S. 15, 22 (1971). There is not, nor could there ever be, an argument that Fraser's speech was obscene, libelous, inciteful, or otherwise undeserving of constitutional protection.

Fraser simply used sexual imagery similar to that found in the greatest works of literature, and indeed Bethel High's own student literary magazine. The Court need look no further than the classic works of William Shakespeare to see that Fraser was punished for using sexual imagery and rhetorical devices that are commonly found in great works of literature which are taught in the classroom. Shakespeare used so many sexual images and double meanings that the noted British linguist Eric Partridge devoted an entire book, including a lengthy glossary, to these references. E. Partridge, *Shakespeare's Bawdy* (1948). Partridge found that Shakespeare used 45 different words and phrases to refer to the male sex organ and 68 to refer to the female genitals, as well as more than 350 different words and phrases which refer to sexual intercourse alone. *Id.* at 24-34.

Partridge's treatise recounts scores of sexual metaphors and allusions found in every work of Shakespeare—for example, *The Comedy Of Errors* (e.g., III, ii, 110-136, a description of a woman's body using geographical terms); *Cymbeline* (e.g., II, v, a denunciation of female sexuality); *King Lear* (e.g., IV, vi, 111-134, a series of sexual images and the exhortation "Let copulation thrive!"); *Macbeth* (e.g., II, iii, 27-37, lament on the effect of drink on sexual performance); *Much Ado About Nothing* (e.g., III, iv, 23-74, a dialog on the undesirability of virginity); and *Pericles* (e.g., IV, ii, a brothel scene). It strains credulity that Matthew Fraser could be

punished for his extracurricular nominating speech when such works of great literature are taught as a part of the required curriculum in many of our schools.

Shakespeare is by no means the only revered author to make use of such imagery. Walt Whitman, America's greatest poet and a standard in any American literature course, used such images throughout his poetry. His "A Woman Waits For Me," for example, describes the strength of a man in graphic and famous prose and employs a theme of manliness similar to that of Fraser's nominating speech. W. Whitman, *Leaves Of Grass* 86 (J. Kouwenhoven ed. 1950). See also *Leaves Of Grass*, *passim* (especially poems "From Pent-Up Aching Rivers," "I Sing The Body Electric," and "Spontaneous Me").

Sexual imagery, moreover, is not confined to great literature; it is employed to convey messages effectively in popular speech and writing. Bethel High School's own student literary magazine employed sexual imagery far more explicit than Fraser's speech. (Jt. App. 13-14.) To then discipline Fraser for his speech without fair warning is unfair and arbitrary censorship.

This is especially true because Fraser's speech was a political speech—speech that is at the core of First Amendment protection. Sexual charges and strong images have been a part of our national political fabric for years—from the slogan "Ma, Ma, Where's my pa? Gone to the White House, Ha! Ha! Ha!" of the 1884 Blaine-Cleveland campaign to the controversy over President Carter's comments about "lust in my heart" in *Playboy*. P. E. Boller, Jr. *Presidential Campaigns* 149 (1984). Indeed, at a prior school election assembly a student had used a "four-letter" word in his speech—again without discipline. (Jt. App. 7, 49.)

Fraser's delivery of his speech at a school election rally does not strip him of these fundamental constitutional protections. To discipline Fraser for his speech violates the First Amendment principles that the state may not discriminate

on the basis of content of non-obscene speech delivered at a public forum, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 95-96 (1972); and that the state may not arbitrarily punish speech under the guise of vague standards that do not give fair warning of proscribed conduct. E.g., *Hynes v. Mayor of Oradell*, 425 U.S. 610, 621 (1976). There was no disruption, let alone a substantial disruption, of the educational process to justify this abridgement of Fraser's free speech rights at a voluntary extracurricular school election rally. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

In sum, against this milieu of sexual references in educational, literary, social and political discourse, a non-obscene speech like Fraser's should not be punished. If "we are not to strangle the free mind at its source" and are to teach our youth that "important principles of our government [are not] mere platitudes," *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 637 (1943), school officials cannot sanitize debate at a high school election to "that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

CONCLUSION

For the foregoing reasons, we join with Respondents and respectfully submit that the decision of the Court of appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

JAMES A. KLENK
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Of Counsel:

MARK SABLEMAN

Attorneys for *Amicus Curiae*
The Freedom To Read Foundation

No. 84-1667

Supreme Court, U.S.

FILED

JAN 13 1986

JOSEPH DANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, *et al.*,
Petitioners
v.

MATTHEW N. FRASER, A MINOR, and
E.L. FRASER, GUARDIAN AD LITEM,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR THE
NATIONAL EDUCATION ASSOCIATION
AS AMICUS CURIAE**

MICHAEL D. SIMPSON *
NATIONAL EDUCATION ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

GARY L. SASSO
BREDHOFF AND KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

*Attorneys for Amicus Curiae
National Education Association*

* Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979)	2, 8, 10
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	4, 5, 8
<i>Cornelius v. NAACP Legal Defense and Education Fund, Inc.</i> , — U.S. —, 105 S.Ct. 3439 (1985)	7
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	5, 9
<i>Illinois State Board of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	5
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	6
<i>Papish v. Board of Curators of the University of Missouri</i> , 410 U.S. 667 (1973)	5
<i>Perry Education Association v. Perry Local Educators' Association</i> , — U.S. —, 103 S.Ct. 948 (1983)	7
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	5, 6
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969)	6, 8
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	5
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	6, 10
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	9



IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 84-1667

BETHEL SCHOOL DISTRICT No. 403, *et al.*,
Petitioners
v.

MATTHEW N. FRASER, A MINOR, and
E.L. FRASER, GUARDIAN AD LITEM,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR THE
NATIONAL EDUCATION ASSOCIATION
AS AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE*

NEA is a nationwide employee organization, with a current membership of over 1.6 million. The vast majority of NEA's members are educators in public schools, colleges, and universities. Among the purposes of NEA, as set forth in its charter, are "to . . . advance the interests of the profession of teaching and to promote the

* The parties have consented to the filing of this brief, which is submitted in support of the respondents in this case.

cause of education in the United States." To this end, NEA frequently takes part in legal proceedings that bear on the rights of teachers and of students in the public schools.

Petitioners and various *amici* have filed briefs in this case purporting to represent the interests of the nation's educational community and arguing that the decision of the Court of Appeals will severely impair the ability of school officials to inculcate in students values of civility and decency. The teachers represented by NEA, however, are on the front line in enforcing school discipline, and, as this Court has recognized, are the ones who bear the greatest responsibility for "inculcating [in students] fundamental values necessary to the maintenance of a democratic political system. . . ." *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979).

For these reasons, NEA has a unique perspective on the issue presented in this case: whether suppression of student expression is necessary to further school officials' interest in inculcating in students values of decency and civility. To be sure, teachers need effective tools to maintain discipline and to instill such values, but at the same time they firmly believe that the education of students must be achieved first and foremost through skillful instruction and teacher example, consistent with constitutional values.

The interest of NEA, speaking for its members, is thus to provide the Court with the perspective of a major component of the nation's educational system, as it bears on this case. We believe that this perspective will assist the Court in reaching a reasonable accommodation between the needs of the schools to inculcate in students certain values on the one hand, and the rights of students to freedom of speech on the other.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue whether, consistent with the First Amendment, public school officials can punish a high school student for giving a political nominating speech containing sexual innuendo in a voluntary student assembly.

This case does not involve a challenge to a school district's authority to determine curriculum content or to punish inappropriate comments expressed in a classroom setting. It does not involve discipline of a student for insubordination or for disrespectful language directed at a teacher, administrator, or other school official. Finally, this is not a case where a student was punished for engaging in disruptive conduct. Rather it is a "pure speech" case: Fraser was punished because of the words he used to express his opinion on an issue that he was concededly entitled to discuss.

In these circumstances, as we develop below, petitioners' disciplinary action cannot be sustained absent a demonstration that punishing Fraser was necessary to effectuate a substantial state interest. Petitioners assert two principal justifications for their action: that Fraser's speech created actual disruption on the school campus, and that, in any event, petitioners were entitled to punish Fraser on account of his speech in order to effectuate the school's interest in inculcating respect for decency and civility in public discourse.

We focus on the latter contention. We demonstrate herein that, in the unique circumstances of this case, petitioners' stated educational objective was implicated minimally, if at all, by Fraser's speech. We further show that petitioners had at their disposal means short of punishing Fraser at once fully suited to achieving their educational objective and compatible with the strictures and values of the First Amendment.

ARGUMENT

1. Although conceding that the First Amendment is applicable to expressive activities by students on public high school grounds, petitioners contend that school officials can punish students for what they say in a voluntary student assembly so long as they have a reasonable basis for doing so and are not motivated by a desire to suppress a particular viewpoint. (Pet. Br., at 17). This argument misstates the constitutional standard by which censorship of student expression on high school grounds must be judged. We demonstrate below that such a minimum standard is unsupported by this Court's decisions and misapplies traditional First Amendment analysis.

As a threshold matter, it is critical to recognize that Fraser's punishment "quite clearly rests upon the asserted offensiveness of the *words* [he] used to convey his message" to the student assembly. *Cohen v. California*, 403 U.S. 15, 18 (1971) (emphasis in original). "The only 'conduct' which the State sought to punish is the fact of communication[;] [t]hus, we deal here with [punishment] resting solely upon 'speech,' . . . not upon any separately identifiable conduct which allegedly was intended by [Fraser] to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing [Fraser's] ability to express himself." *Ibid.*

The "usual rule" that governs such cases is that "governmental bodies may *not* prescribe the form or content of individual expression." *Id.*, at 24 (emphasis added). This rule, of course, is not absolute. But "most situations where the state has a justifiable interest in regulating speech will fall within one or more of . . . various established exceptions," not present here—namely, speech that is "obscene," speech that constitutes "fighting words," speech intended to "provok[e] a given group to hostile

reaction," or speech that intrudes "unwelcome views and ideas" into "the privacy of the home." *Id.*, at 20-21, 24; see, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 744-45 (1978).

When the state seeks to regulate the content of speech outside these established exceptions it must be prepared to demonstrate a "particularized and compelling reason for its actions." *Cohen v. California*, 403 U.S., at 26. Put another way, the state must establish that the speech at issue clearly imperils substantial state interests.¹ E.g., *FCC v. Pacifica Foundation*, 438 U.S., at 744-45; *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). As a logical corollary to this principle, this Court has made clear that restrictions on speech must be "no greater than is essential to the furtherance of [the state's] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); See, e.g., *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). As this Court has explained:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of [governmental] abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960). Thus, it is not enough that the state can demonstrate that direct regulation of speech would advance some legitimate state interest. For if this interest can be effectuated by alternative means, countenancing punishment of speech would needlessly sacrifice First Amendment values.

¹ This Court has employed a variety of terms—"compelling," "substantial," "paramount"—to describe the nature of the government interest that must be shown. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), and cases cited therein.

2. These principles apply fully in the public school setting. As this Court has held, “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969). “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.*, at 506. For “[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.” *Id.*, at 513.

Of course, First Amendment rights must be “applied in light of the special characteristics of the school environment,” *id.*, at 506, because the state has special interests in that context. But this reality creates no justification for discarding the constitutional analysis applicable to the regulation of the content of speech generally, for that analysis is fully well suited to taking account of the special concerns arising in the public school context. While in this setting, the state’s interests may vary, those interests, and the state’s effort to effectuate them, may manageably be judged by the same standards used to evaluate actions by the state in its many other forms. If anything “[t]he vigilant protection of [First Amendment] freedoms is nowhere *more* vital than in the community of American schools.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), quoting *Shelton v. Tucker*, 364 U.S. at 487 (emphasis added). “That they are educating the young for citizenship is reason for scrupulous protection of [First Amendment] freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)

3. Petitioners insist, nonetheless, that they need not demonstrate that their punishment of Fraser was necessary to effectuate a compelling state interest, but only that their actions "were reasonable in light of the surrounding circumstances." (Pet. Br., at 17). This is so, petitioners contend, because the school assembly was a "nonpublic forum," under this Court's decisions, notably *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 105 S.Ct. 3439 (1985) and *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983). Petitioners' contention is predicated upon a fundamental misunderstanding of this Court's decisions.

In *Cornelius* and *Perry*, this Court addressed the issue whether and in what circumstances speakers or issues could be excluded from a particular forum. As this Court explained, it "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 105 S.Ct., at 3448. Under this analysis, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.*, at 3451 (emphasis added). These decisions mean no more nor less than that the government must be given latitude in permitting access to forums that the government has established for particular purposes. These decisions simply do not address what constitutional standard applies to the regulation of the content of speech delivered within the boundaries set for speakers and issues, whatever the nature of the forum.

This case poses no issue of access to a forum: Fraser was concededly welcome to speak at the student government assembly, and he spoke on the subject to which the assembly was dedicated. The issue in this case, as in

Cohen, is simply whether the state was justified in punishing Fraser on account of the words he selected to express his opinion on the issue he was concededly free to address. And in order to prevail on *this* issue, petitioners, as we have shown, must establish that their actions were necessary to effectuate a compelling state interest.

4. Petitioners, as an alternative argument, have attempted to meet this test on two principal grounds: by contending that Fraser's speech *actually* disrupted educational activities, and by contending that, in any event, punishing Fraser was necessary in order to effectuate the state's interest in inculcating values of decency and civility in public discourse. Petitioners' first contention must fail under a straightforward application of the material and substantial disruption standard articulated in this Court's decision in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S., at 508-14. We focus our discussion on petitioners' more novel, second contention.

We begin by acknowledging that the state, through its public schools, has a substantial interest in "prepar[ing] individuals for participation as citizens, and in . . . preserv[ing] the values on which our society rests." *Ambach v. Norwick*, 441 U.S. at 76 (1979). This interest may extend, to a limited extent, to inculcating values of decency and civility in public discourse. Thus, the issue in this case is not whether petitioners' stated interest is a legitimate or substantial one, but whether petitioners were justified in seeking to promote this interest by punishing Fraser on account of his speech. Resolution of this issue requires a careful examination of the circumstances in which this speech was uttered in order to determine whether, under such circumstances, disciplining Fraser was the only means practicably available for effectuating the state's interest. As this Court has held, it is imperative to "consider [the] context" of

the speech in question "in order to determine whether the [state's] action" in regulating its content "was constitutionally permissible" *FCC v. Pacifica Foundation*, 438 U.S., at 747-49.

The circumstances in this case make clear that petitioners' stated interest was only minimally implicated, if at all, by Fraser's speech. As the Ninth Circuit observed:

Although Fraser delivered his speech to a school-sponsored assembly, his speech was clearly not part of the school curriculum. The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.

755 F. 2d, at 1364. Fraser's speech, therefore, did not impair the decorum of a classroom, defy curricular requirements, or imply official endorsement.² Attainment of petitioners' educational objectives hardly requires squelching every comment inconsistent with the state's teachings, no matter how tenuously such speech may impinge upon the state's goals.

Further, petitioners have available to them tried and true methods for inculcating the values they seek to promote—which, from all appearances, petitioners have made no effort to pursue—that are at once compatible with the First Amendment and the mission of the public schools. As this Court has observed, through "present [ation] and expl[anation] [of] subject matter in a way that is both comprehensible and inspiring," and through

² Cf. *Widmar v. Vincent*, 454 U.S. 263, 271 n.10, 274 (1981) ("by creating a forum [a] [u]niversity does not thereby endorse or promote any of the particular ideas aired there," nor does it "confer any imprimatur of state approval"). Petitioner could have dispelled any appearance of endorsement by stating its position in whatever medium it uses to communicate its views to the student body or parents.

teacher "example," a public school may legitimately "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach v. Norwich*, 441 U.S., at 78-79; cf. *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. at 631, quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (a state can "inspire patriotism and love of country" by requiring "*instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty,*" but the state is not free to inculcate these values by directly compelling students to proclaim their fidelity to this Country) (emphasis added).

Indeed, precisely because of the special characteristics of the school environment, petitioners are peculiarly well-situated to effectuate their inculcative goals without resorting to methods that directly stifle First Amendment freedoms. Petitioners have charge of public school students throughout the school day, day after day, week after week, year after year. And the greatest portion of this time is spent in the closely-supervised context of the classroom. During these hours, the state determines—as it can in no other setting—much of what the students must hear, and, to a significant degree, how they must hear it. In this way, petitioners enjoy the unique opportunity to shape and influence—profoundly—the views and values of the students under their charge.

What petitioners have been unable to achieve by virtue of this special position, through the proper exercise of this awesome authority, they could not hope to achieve by punishing Matt Fraser. It is inconceivable, in light of petitioners pervasive influence over public school students, that they could succeed in inculcating respect for decency and civility only by silencing this one student's speech arising in the unique circumstances described.

In sum, petitioners have failed to demonstrate that punishing Fraser was necessary to effectuate their legiti-

mate educational objectives. The state should not be free to select as its *preferred* means of inculcating the values that it seeks to promote those methods calculated to encroach most directly and broadly on First Amendment freedoms.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

MICHAEL D. SIMPSON *

NATIONAL EDUCATION ASSOCIATION
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

GARY L. SASSO

BREDHOFF AND KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amicus Curiae
National Education Association

* Counsel of Record